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"down to the time of Edgar, their payment seems to have been enforced by

No law properly so called

See page 5 Tithes are land

"tithes a form of property not so very different from the land itself"

(Hon'ble Spencer Wortley, at meeting at the Surveyors Institution, Monday January 6th 1890.)

THE LAW

OF

TITHES AND TITHE RENT-CHARGE

BEING A TREATISE ON THE

LAW OF TITHE RENT-CHARGE, WITH A SKETCH OF THE HISTORY AND LAW OF TITHES PRIOR TO THE COMMUTATION ACTS.

BY

EDWARD FAIRFAX STUDD, M.A., B.C.L. (Oxon.)

OF THE INNER TEMPLE, BARRISTER-AT-LAW.

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PREFACE.

At the present time, when the subject of Tithes is attracting a large amount of public attention, and several Bills attempting to deal with it have been before Parliament, there seems to be an astonishing and widespread absence of accurate knowledge of its history and of the working of the Acts relating to it, which has given rise to many fallacious arguments and unsound propositions.

In this unsatisfactory state of knowledge on the subject the Author's main object has been to produce a book which gives an account of the history and present position of the law in a popular form.

While, however, the history and old law—which is now practically obsolete—has only been superficially dealt with, so as to enable the general reader to appreciate the subject, an attempt has been made to treat exhaustively

the present law, and to refer in the notes to all reported decisions of any practical value at the present day, and in these respects, therefore, it is hoped that the book may prove useful to the profession as well as the general public.

In the body of the book only one reference has been given for each case cited, but a Table of Cases will be found prefixed giving references to the various other Reports in which the cases may be found.

It was considered advisable not to print the various Acts in full as an Addendum, as the bulk and cost would thereby be materially increased without any adequate compensating advantage, all the provisions of practical interest being reproduced or carefully analysed in the body of the book.

E. F. S.

11, King's Bench Walk, Temple,
January, 1889.

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CHAPTER I.

SKETCH OF THE HISTORY AND LAW OF TITHES PRIOR TO THE COMMUTATION ACTS.

THE origin of tithes and the date of their introduction into the Christian Church are shrouded in obscurity; we know, however, that they existed in England in Anglo-Saxon times.

Down to the time of Edgar their payment seems to have been enforced by no law, properly so called, but only by the penalty of ecclesiastical censure; and those who paid them seem to have done so at their own caprice, so long as they were paid to some person or body for ecclesiastical purposes, the tendency being, however, to pay them to the older or "mother" churches.

Edgar, according to Lord Selborne,[1] was the first king to make any law attaching a legal penalty to the non-payment of tithes. He also recognized and en-

[1] "Ancient Facts and Fictions concerning Churches and Tithes."

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joined their payment to the mother churches, permitting, however, anyone, who had on his land a church with a burial-place, to give one-third of his tithes to that church. In these private churches Lord Selborne sees the origin of our modern parishes.[1]

In spite, however, of this law of Edgar's, and further ordinances of subsequent monarchs, it is by no means certain that, even at the date of the Conquest, the payment of tithes was altogether general or compulsory.

Soon after the Conquest the payment appears to have become general, and the one-third, which Edgar allowed to be paid to the private (afterwards the parish) church, seems by a gradual process to have become in most cases the whole, but even then tithes were not by any means universally paid to the parish church, "arbitrary" consecrations, as Selden called them,[2] to other churches and religious institutions continuing down to the time of John, and some even to Edward I.

This is accounted for by the number and influence of the monasteries, which endeavoured to obtain the consecration of tithes to themselves, instead of to the secular or parochial clergy.

According to the opinion hitherto commonly held, tithes were originally devoted to four purposes—1. The use of the bishop; 2. The maintenance of the church's fabric; 3. Distribution among the poor, including the entertainment of strangers; and 4. The use of the in-

[1] "Ancient Facts and Fictions concerning Churches and Tithes."
[2] "History of Tithes."

cumbent. Subsequently, when the sees of the bishops became otherwise amply endowed, they were prohibited from demanding their share, and thus the division became threefold.

That these quadripartite and tripartite divisions existed on the Continent there seems to be no doubt, but Lord Selborne[1] asserts that there is no authority for saying that the tripartite division grew out of the quadripartite, but that each of them was merely local. He further says that he can find no law or canon depriving the bishops of their share, nor any ground for believing that either the quadripartite or tripartite division was adopted in England. He seems to think that the distribution of the church's revenues, including tithes, rested with the bishop alone.

However that may be, there can be no doubt that the feeding of the poor and the entertainment of strangers formed one of the main purposes to which tithes were in early times devoted, at all events in theory, if not in practice.

The monasteries and other spiritual corporations having by various means acquired all the advowsons within their reach, and with the licence of the king and consent of the bishop "appropriated" the benefices to themselves, deputed one of their own body to perform the services of the church in those parishes of which they had thus become the rectors or "parsons,"[2] them-

[1] "Ancient Facts and Fictions concerning Churches and Tithes."

[2] "Parson" = *persona ecclesiæ*, or one that hath full possession of all the rights of a parochial church (Stephen's Commentaries).

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selves seeing to the repair of the church's fabric, and entirely disregarding the third purpose for which tithes are said to have existed, or considering that it was sufficiently fulfilled in supporting themselves, and in such charity, if any, as they might see fit to dispense, applied the whole of the endowments to their own purposes.

In the reign of Henry VIII., when the monasteries and other religious houses were dissolved, all these "appropriations," as they are called, were vested in the Crown, and many have been from time to time granted by the Crown to subjects, who thus became lay rectors or "impropriators," as they are called, to distinguish them from the original "appropriators," who must of necessity have been spiritual.

It has been said[1] that the appropriators were in the habit of deputing one of their body to perform the services in the parishes of which they were the rectors or parsons, and hence arises the distinction between rectorial and vicarial tithes, this deputy being called a *vicarius*, or vicar.

This vicar was at first entirely dependent for his stipend and the duration of his vicarship upon the caprice of the appropriator; but in the reign of Henry IV. a statute (4 Hen. 4, c. 12) was passed, which provided that the vicar should be a secular person, that is, not a member of any religious house; that he should not be removable at the caprice of the appropriator; that he should be canonically instituted and inducted; and

[1] See last page.

K. Henry IV = 1399 - 1413.

that he should be sufficiently endowed at the discretion of the ordinary for three express purposes, viz., to do divine service, to inform the people, and to keep hospitality.

The endowments granted to vicars in pursuance of this statute are usually a portion of the glebe belonging to the parsonage or rectory, and a share of the tithes. There was, however, no uniformity in the endowments; hence some vicarages are more liberally endowed than others, and tithes, which in some parishes belonged to the vicar, in others belonged to the rector or parson. The distinction between rectorial and vicarial tithes was, therefore, an arbitrary one, depending in no way on the nature of the titheable produce.

The appropriators, however, would naturally assign, as far as possible, those tithes which, from their nature, were more difficult to collect; hence, in practice, there was a certain amount of uniformity in the assignments. Thus, probably, it comes that what are called small or privy tithes are usually vicarial, and great tithes rectorial, endowments frequently vesting "small tithes"—*eo nomine*—in the vicar.

The distinction between great and small tithes is one arising from the nature, not the quantity, of the titheable produce.

Tithes are incorporeal hereditaments, and as such are land within sect. 2, sub-sect. 10, of the Settled Land Act, 1882 (45 & 46 Vict. c. 38).[1]

[1] *In re Esdaile*, W. N. 1886, p. 47.

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They are either—

1. Prædial, being of the produce[1] of the land, *e. g.*, corn, hay, wood, wine, hops, and fruits. They also include agistment tithes; *i. e.*, the tithes of the herbage, grass or growing turnips[2] eaten by barren and unprofitable cattle.
2. Mixed, being of the produce of animals[3] receiving their nourishment from the land; *e. g.*, calves, young pigs, chicken, wool, milk, eggs, &c.
3. Personal, being of the produce of the industry of man. This does not include the profits of a trade, and the only personal tithes payable in later times were those of mills and fish or fishing.

All personal and mixed tithes are small tithes; of prædial, some are great and some small. The tithes of corn and hay universally, and of wood in the absence of any local custom to the contrary, are great tithes; so are those of beans and peas, whether cut green or harvested, and of clover, vetches, and tares when harvested. The tithes of the three latter and of all grasses, when cut and carried green, are small tithes; so are

[1] The substance of the land, as distinguished from its produce or increase, is not titheable at common law, though it might be by custom; *e. g.*, lead ore in Derbyshire, and tin in Devon and Cornwall.

[2] By statute 5 & 6 Will. 4, c. 75, turnips severed from the land, if consumed thereon by sheep or cattle, are subject to the same tithe as if consumed unsevered.

[3] Of course this has nothing to do with animals *feræ naturæ*, which belong to no one, and are not titheable at common law, though they may have been by custom.

also those of potatoes, turnips, hops, fruits, and agistment.

Besides rectors and vicars, there are other persons to whom tithes were sometimes payable. These are as follows:—

1. Parcellers, or proprietors of certain parcels of tithes originally forming part of a rectory, but which have been granted away.
2. Portionists, or proprietors of certain portions of tithes which never formed part of any rectory, being the tithes of particular manors or farms which, prior to the parochial division of tithes, were granted to some spiritual person or body. Some of these portions still remain in the possession of the original grantees or their spiritual successors; while others, on the dissolution of the monasteries, became vested in the Crown, some of these latter being retained by the Crown and others granted out to subjects. Hence "portions" are payable sometimes to the rector or vicar of another parish.
3. Perpetual curates, who may have a right to tithes by prescription, which is especially the case in Wales. The origin of perpetual curates was as follows:—Some appropriations were for various reasons exempt from the provision of 4 Hen. 4, c. 12, above[1] mentioned, and in such cases no vicar has ever been endowed. There exists, however, in most of these chapelries a perma-

[1] See p. 4.

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nent minister in holy orders, termed a perpetual curate, appointed of old by the rector, and endowed with portions of the tithe.[1]

4. The Crown, in respect of tithes of extra-parochial places.

Tithes in parishes are due of common right to the rector, and it is for the person claiming any portion thereof to establish his claim by evidence. Tithes were payable in respect of the produce of all lands which were not barren, *i. e.*, naturally incapable of producing titheable produce, except the following:—

1. Crown lands, by virtue of the Crown's prerogative, while in the occupation of the Crown or its lessee, but not when granted away to a subject.
2. Church lands or glebe, while in the occupation of the parson or incumbent by virtue of the maxim, "Ecclesia decimas non solvit ecclesiæ." Thus the rector and vicar of the same parish would not pay tithes to one another, but the rector or vicar of one parish might pay tithes to the rector or vicar of another.[2]
3. Lands which having been parcel of the possessions of one of the three privileged orders—Cistercians, Templars, or Hospitallers—are discharged from tithes while in the occupation of the owner, but not of his tenant or lessee.

[1] By statute 31 & 32 Vict. c. 117, it is enacted that the incumbent of every parish, not being a rector, shall be styled a vicar, and his benefice a vicarage. This statute only affects his style, and in no way alters the incidents to perpetual curacies.

[2] See *Warden* v. *Dean, &c. of St. Paul's*, 4 Price, 65.

4. Any abbey lands (as they are called) the owner of which could show that they were part of the possessions of one of the religious houses dissolved in the reign of Henry VIII., and were at the time of the dissolution held free or discharged from tithe; religious houses having had the power to get their lands discharged from tithes in various ways. In this and the following cases the land is discharged, whether in the occupation of the owner or not.
5. Lands between the owner of which and the incumbent, with the consent of the ordinary and patron, an agreement had been entered into that they should be discharged for the future from the payment of tithes in consideration of some land or other "real" recompense given in lieu thereof, which is called a composition real. 2 & 3 Will. 4, c. 100, s. 2, provides that every such composition, which had then been made or confirmed by the decree of a Court of Equity in a suit properly instituted, and had not since been set aside or departed from, should be held valid in law.
6. Any lands in respect of which the existence of a *modus decimandi* (commonly called a "modus"), or customary mode of tithing different from the ordinary payment of one tenth, could be proved from time immemorial.[1]

[1] See *Earl of Stamford and Warrington* v. *Dunbar*, 13 M. & W. 822.

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For a modus to be good, six rules must be observed:

(1) It must be certain and invariable.

(2) It must be beneficial to the parson himself, (*e. g.*, to repair the chancel), not merely to the church or parish.

(3) It must be something different from the thing compounded for—*e. g.*, one load of hay instead of all tithe of hay is not a good modus.

(4) It must not be for another species of tithe—*e. g.*, a modus for milch cows will not discharge from payment of tithe for barren cows.

(5) It must be in its nature as durable as the tithes discharged by it.

(6) It must not be "rank," or too large.

Rules (3) and (6) arise obviously from the fact that a modus is assumed to have arisen from a contract between tithe payer and tithe owner, as in the case of a composition real, and it is absurd to suppose that either party would have entered into a grossly one-sided one, and, therefore, the alleged modus carries in itself the proof that it can never have had any foundation in contract.

7. Any lands the owner of which could prescribe *in non decimando*, *i. e.*, show that they had been free from the payment of tithes from time immemorial. Only a spiritual person or body, or their successors deriving a title from them, and the Crown could prescribe *in non decimando*. A layman must have given positive proof of the origin of the discharge of his lands; mere non-

payment from time immemorial not sufficing in his case. This distinction, however, became subsequently of little moment in consequence of the statute 2 & 3 Will. 4, c. 100, next to be considered.

8. Any lands in respect of which non-payment of tithes, or the existence of a modus, could be proved for the time fixed by statute 2 & 3 Will. 4, c. 100,[1] which provides as follows:—

(1) Where the tithe is claimed by the Crown, the Duchy of Lancaster, or any lay person not being a corporation sole, or by any corporate body,—

(i) If a modus has been paid, or the land been enjoyed free from all tithe for thirty years, this shall create an exemption, unless it can be shown, in the case of payment of a modus, that tithes or money, or something different from the modus, in the case of free enjoyment, that tithes or other things in lieu thereof, have been paid within the thirty years; or, that the modus or free enjoyment was under some writing.

(ii) If a modus has been paid, or the land been enjoyed free from tithe for sixty years, this shall create an absolute exemption, unless

[1] This Act is not impliedly repealed by statute 3 & 4 Will. 4, c. 27. The two Acts co-exist (*Dean, &c. of Ely* v. *Bliss*, 2 De Gex, M. & G. 459).

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proved to have been under some agreement or consent in writing.[1]

(2) Where the tithe is claimed by a corporation sole, the payment of a modus or free enjoyment during the time of two successive incumbents, and three years after the induction of a third, if such period amounts to sixty years, or if it does not, then the payment of the modus or free enjoyment for sixty years shall create an exemption.

Under this Act it has been held that mere non-payment or non-render creates an exemption from payment of tithes, and that the statute thus creates an entirely new ground of exemption,[2] mere non-payment being no defence at common law.[3]

It was, however, held in the same case, that no exemption could be claimed under the Act from any particular tithe, but only from the tithes of every kind affecting the land.

Again, any claim to tithes might be barred under the Statutes of Limitations, 3 & 4 Will. 4, c. 27, now amended by 37 & 38 Vict. c. 57, s. 9.[4]

[1] As to what is a sufficient agreement or consent in writing, see *Toynbee* v. *Brown*, 3 Exch. 117.

[2] *Salkeld* v. *Johnston*, 1 Mac. & Gord. 242.

[3] *Andrews* v. *Drever*, 3 Cl. & F. 314.

[4] See note to last page. It was held in the case of *Dean of Ely* v. *Bliss* (2 De Gex, M. & G. 459), that this statute only applied as between rival tithe owners, and not between tithe payer and tithe owner; but this case was discussed by Lord Selborne in his judgment in *Irish Land Commission* v. *Grant* (10 App. Cas. 14), and must be taken to be overruled by the judgment of the House of Lords in that case.

CHAPTER II.

COMMUTATION AND APPORTIONMENT.

SECT. 1.—*General Observations.*

IN the year 1836 was passed the Act 6 & 7 Will. 4, c. 71, providing for the commutation of tithes throughout England and Wales into a money payment or rent-charge, which, though the exact payment varies each year with the average price of corn in a manner to be noticed hereafter,[1] is fixed in this sense, that the amount payable in each year is calculated according to the average price of corn upon a fixed valuation or rent-charge. This process has for some time been practically complete. It is, however, impossible to understand the present position of the law of tithe, especially with a view to its redemption, without going at some length into the process of commutation. Moreover, many of the provisions applicable to commutation are by later Acts extended to redemption, and others, such as those relating to maps, are of practical importance at the

[1] See p. 41.

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present day. Before, however, proceeding to consider the process in detail, it will be convenient to consider certain definitions and provisions contained in the Act of 6 & 7 Will. 4 (which will hereafter be called the principal Act), and the various subsequent Acts, remembering that all the Acts are to be read as one with the principal Act.

The following definitions are given in sects. 12 and 13 of the principal Act:—

1. "Person" includes the King and Queen, and any body corporate, whether aggregate or sole.
2. Any word used in the singular number includes the plural, and *vice versâ*.
3. Masculine includes feminine.
4. "Lands" includes all messuages, tenements, and hereditaments.
5. "Tithes" includes all uncommuted tithes, portions and parcels of tithes, and all moduses, compositions real, and prescriptive and customary payments.
6. "Parish" and "parochial" include every parish, extra-parochial place, township or village within which overseers of the poor are separately appointed, and every district of which the tithes are payable under a separate impropriation or appropriation, or in a separate parcel or portion, or which the commissioners appointed under the Act may by any order direct to be considered as a separate district for the commutation of tithes.

7. "Landowner" or "titheowner," or "owner of lands," or "owner of tithes," include—

(1) Every person in the actual possession or receipt of the rents or profits of any lands or tithes, without regard to the real amount of interest of such person, except—(i) any tenant for life or lives or years holding[1] under a lease or agreement for a lease on which a rent of not less than two-thirds of the clear yearly value of the premises comprised therein is reserved; and (ii) any tenant for years holding under a lease or agreement for a lease for a term which shall not have exceeded fourteen years from its commencement:

(2) Where tithes or lands have been leased or agreed to be leased to any person for life or lives or years by any lease or agreement for a lease, on which a rent less than two-thirds of the clear yearly value of the premises comprised therein shall have been reserved, and of which the term shall have exceeded fourteen years from its commencement, the person for the time being in the actual receipt of the rent reserved upon such lease or agreement, jointly with the person liable to the payment of the rent:

(3) Where any person is in possession or receipt of the rents or profits of any tithes or

[1] This and the following words qualify the words "tenant for life or lives," as well as "tenant for years." Tenant for life under a will or settlement, if in receipt of the rents and profits, is an "owner."

lands under any sequestration, extent, elegit, or other writ of execution, or as a receiver under any order of a Court, the person against whom such writ has issued, or who but for such order would have been in possession, jointly with the person in possession:

(4) The Ecclesiastical Commissioners, under 4 & 5 Vict. c. 39, s. 29, in respect of lands, tithes, &c. vested in them under certain statutes:

(5) Where the ownership of lands or tithes is vested in the Crown, the First Commissioner of Woods, Forests, and Land Revenue (see 14 & 15 Vict. c. 42, s. 2):

(6) Where the ownership of lands or tithes is vested in the Crown in right of the Duchy of Lancaster or Duchy of Cornwall, the Chancellor of the Duchy of Lancaster, or the officers of the Duchy of Cornwall, entitled to grant leases of the Duchy lands.

Sect. 14 of the principal Act provides that when the same person is owner of lands and of tithes, or owner of lands or tithes and patron of the benefice to which the tithes belong, he may be dealt with in each of the several characters borne by him.

Sect. 13 provides that where the Crown is patron of any benefice, the Lord High Treasurer, or First Lord Commissioner of the Great Seal, or, if the patronage is vested in the Crown in right of the Duchy of Lancaster, the Chancellor of the Duchy, may act for the Crown.

Sect. 15 provides that where any patron of a benefice,

or owner of lands or tithes, or any person interested in any question as to tithes, is a minor, idiot, lunatic, feme covert,[1] beyond the seas,[2] or under any other legal disability, the guardian, trustee, committee, husband, or attorney, or any person nominated by the commissioners, after inquiry, under their hands and seal, may act in his or her stead; and sect. 16 enables any land or tithe owner, by power of attorney under his hand, to appoint an agent to act for him. This power of attorney, which need not be by deed, or a copy thereof authenticated by two credible witnesses, must be appended to every agreement executed by the agent so appointed, and must be sent with it to the office of the commissioners. It is exempt from stamp duty (sect. 91).[3]

For the purpose of carrying the Tithe Commutation Acts into effect, commissioners were appointed by sects. 1 and 2 of the principal Act, under the style of "The Tithe Commissioners for England and Wales."

Their appointment having been continued by subsequent statutes, they were, by 4 & 5 Vict. c. 35, ss. 1 and 2, and 14 & 15 Vict. c. 53, united with the Copyhold Commissioners and Inclosure Commissioners for

[1] But see now Married Women's Property Act, 1882.

[2] This disability is abolished by 19 & 20 Vict. c. 97, s. 10.

[3] The following form of a power of attorney is given by the Act. It may be used with the necessary alterations, but is not compulsory: —"I, A. B., of [&c.], do hereby appoint C. D., of [&c.], to be my lawful attorney, to act for me in all respects as if I myself were present and acting in the execution of an Act passed in the sixth and seventh years of his present Majesty, intituled [&c.]."

Chap. II. Sect. 1.

England and Wales; but now by sect. 48 of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), these three sets of commissioners are united into one body under the style of "Land Commissioners for England."

To the commissioners so appointed various powers have been given by statute, of which the following may conveniently be noted here:—

1. Under sects. 4 and 11 of the principal Act they may appoint, amongst other officers, assistant commissioners, to whom they may delegate all powers conferred on them, which do not require to be exercised under their seal.
2. Under sect. 10 of the principal Act, and sect. 24 of 3 & 4 Vict. c. 15, they may summon witnesses, administer oaths to them, and examine them upon oath upon any matter relating to the commutation,[1] and under sect. 93 anyone refusing to attend, if within ten miles, or to give evidence, is guilty of a misdemeanor, and anyone wilfully giving false evidence, or making or subscribing a false affidavit or declaration, is guilty of perjury.
3. Under sect. 10 of the principal Act, and sect. 24 of 3 & 4 Vict. c. 15, they may cause to be produced upon oath all books, deeds, contracts, agreements, accounts, writings, terriers,[2] maps,

[1] Extended by sect. 9 of 49 & 50 Vict. c. 54 to the working of that Act.

[2] A terrier is an ancient document acknowledging rents or services due to the lord, or tithes due to a tithe owner.

plans and surveys, or copies thereof, in any way relating to any matter connected with the commutation,[1] except documents relating to the title to any lands or tithes, or which the person required to produce them may swear do not relate to the matter in issue;[2] and, by sect. 93, anyone wilfully altering, withholding, destroying, or refusing to produce any of the documents above enumerated, or any copy thereof, is guilty of a misdemeanor. No one, however, can be required to travel more than ten miles in obedience to any summons to produce any such documents. The commissioners may also permit copies to be taken upon payment of the expense by the person requiring them.

4. Under sects. 45 and 46 of the principal Act, and sects. 9 and 10 of 5 & 6 Vict. c. 54, they may hear and determine, subject to appeal, any suits pending touching the right to any tithes,[3] or any question of any modus, composition real, or customary payment, or any claim of exemption from or non-liability to the payment of any tithes, and

[1] Extended by sect. 9 of 49 & 50 Vict. c. 54, to the working of that Act.

[2] This provision did not take away the right of a plaintiff in a question of disputed right to file a bill of discovery in Equity (*Morris* v. *Duke of Norfolk*, 9 Sim. 472).

[3] This does not authorize the commissioners to decide any question between rival claimants to the tithes, but only suits between tithe owner and tithe payer as to whether the tithe is or is not payable in kind. (See note to Chitty's Statutes, and cases there collected.)

may determine the situation or boundary of any lands, or any difference which may hinder the making of the award, and may make an award, founded upon their decision or on that of the Court on an appeal. This award may also deal with the costs of any such suit, and is made by the Act conclusive evidence of the liability or non-liability of the lands, the amount of any arrears, and the liability of the several parties to the payment of costs.

5. Besides the power of settling boundaries above mentioned, the Acts give the commissioners extensive powers as to boundaries.

Sect. 2 of 7 Will. 4 & 1 Vict. c. 69 enables them, in case of any doubt or dispute as to the boundaries of any district or parish in which the tithes were to be commuted, on the application of the owners of two-thirds of the lands in the parish, to settle them subject to certain formalities, and to the right of any person dissatisfied to remove their judgment into the Queen's Bench by certiorari, as provided by sect. 3 of the same Act and sect. 35 of 2 & 3 Vict. c. 62.

Again, sect. 34 of 2 & 3 Vict. c. 62, extended by sect. 28 of 3 & 4 Vict. c. 15, gives them further powers to settle boundaries between parishes, townships and individual owners;[1] and sect. 21

[1] See *Re Ystradgunlais Commutation*, 8 Q. B. 32, and *Re Dent Commutation*, id. 43.

of 9 & 10 Vict. c. 73 enacts that any determination of the commissioners as to boundaries, which has not been removed within six calendar months, is to be valid and conclusive, notwithstanding any want of form.

Finally, sect. 36 of 2 & 3 Vict. c. 62 empowers them to apportion the costs of any inquiry into boundaries among the persons interested, and provides for the recovery of the costs so apportioned, as in the case of other expenses under the Acts.

6. Under sect. 73 of the principal Act they or any assistant commissioner may order all the expenses incurred by them in the exercise of the powers considered under 2, 3, and 4, including the expenses of witnesses and of the production of documents, to be paid by the parties interested in such proportions as they may think fit.
7. Sect. 25 of 2 & 3 Vict. c. 62 empowers them to adjourn any meeting by notice under their hands without attending to do so.

This will be a convenient place in which to note certain miscellaneous provisions of the Acts.

1. Sect. 2 of the principal Act provides that all agreements and awards confirmed by the commissioners shall be sealed or stamped with their common seal, and all agreements and awards, and other instruments proceeding from their board, and all copies of any such purporting to

be so sealed or stamped, shall be received in evidence without any further proof thereof. The section further provides that no agreement or award shall be of any force unless so sealed or stamped.[1]

2. Sects. 47 and 48 enact that no suits or proceedings under the Acts are to abate or cease by reason of the death of any person interested.
3. Sect. 49 enacts that nothing in the Acts is to affect the operation of the Statute of Limitations (3 & 4 Will. 4, c. 27), as amended by 37 & 38 Vict. c. 57, s. 9.
4. Sect. 90 enacts that the Acts shall not extend to Easter offerings,[2] mortuaries,[3] surplice fees,[4] tithes of fish or fishing, personal tithes (except tithes of mills), mineral tithes, or any payment instead of tithes within the city of London,[5] nor

[1] As to sealing the map or plan of the apportionment, see pp. 37, 40.

[2] Easter offerings are small sums paid to parochial clergy at Easter as a composition for personal tithes.

[3] Mortuaries are customary gifts claimed by and due to the parson in certain parishes on the death of a parishioner.

[4] Surplice fees are fees payable on ministerial offices of the church, *e.g.*, marriages, baptisms, &c.

[5] Payments in lieu of tithes within the city of London under 37 Hen. 6, c. 12, are not really payments in lieu of tithes at all, the so-called "tithes" having, in the absence of express statutory provisions, none of the attributes of tithes at common law; they are not recoverable by distress, and are not rateable to the poor under stat. 43 Eliz. c. 2 (*Esdaile* v. *Assessment Committee of the City of London*, 19 Q. B. D. 431; see also *Payne* v. *Esdaile*, 13 App. Cas. 613). They do not, therefore, properly fall within the scope of this book.

to any permanent rent-charge, or other rent or payment in lieu of tithes calculated according to any rate or proportion in the pound on the rent or value of any houses or lands in any city or town under any custom or private Act of Parliament, nor to any lands or tenements the tithes of which had been, prior to 1836, commuted or extinguished under any Act of Parliament; but sect. 9 of 2 & 3 Vict. c. 62 provides that Easter offerings, mortuaries, surplice fees, or tithes of fish or fishing, or of minerals, may be commuted by parochial agreement before the confirmation of any apportionment after a compulsory award.

5. Sects. 1—9, 17, and 39, of 23 & 24 Vict. c. 93 provide for the conversion of corn rents payable under any local Act in lieu of tithes into a rent-charge upon the same lines as the commutation of tithes; and the statute 48 & 49 Vict. c. 32, provides for the redemption of the rent-charge.[1]
6. Sects. 91 and 92 of the principal Act, sect. 12 of 7 Will. 4 & 1 Vict. c. 69, and sect. 32 of 1 & 2 Vict. c. 64 provide that no stamp duty shall be charged upon any advertisement, agreement, award, or power of attorney inserted, made, or used for the purpose of carrying into effect any of the provisions of the Acts, or upon the correspondence of the commissioners.
7. Sect. 94 of the principal Act enacts that no action

[1] See p. 93.

shall be brought after three calendar months from the time of the act complained of against any commissioner or assistant commissioner, justice of the peace, valuer, umpire, or surveyor, for anything done under the Acts.[1] Of every action brought twenty-one days' notice is to be given in writing to the person against whom the complaint is made; and, in the event of the defendant succeeding in any action so brought, he is to have his costs as between solicitor and client.

8. Sect. 95 of the principal Act provides that no proceedings under the Acts shall be quashed for want of form, or be removed by certiorari, except in cases relating to boundaries, in which an appeal by certiorari is expressly granted by 7 Will. 4 & 1 Vict. c. 69, s. 3.

Besides the above, the Acts contain certain provisions incidental to the process of commutation, which it is unnecessary to consider in detail at the present day, *e. g.*, provisions for—

The sale of buildings and their sites, rendered unnecessary by the commutation (sect. 87 of the principal Act, and sect. 15 of 2 & 3 Vict. c. 62);

The surrender by any lessee of tithes of his lease (sect. 87 of the principal Act);

The fixing of a time for the commencement of the rent-charge, and provisions incidental thereto

[1] This provision only applies to acts done within the authority given by the Acts (*Acland* v. *Buller*, 1 Exch. 837).

(7 Will. 4 & 1 Vict. c. 69, s. 11; 2 & 3 Vict. c. 62, s. 10; 3 & 4 Vict. c. 15, ss. 1—13, and 5 & 6 Vict. c. 54, ss. 3, 12);

The exemption from rent-charge of gardens and lawns of small extent, the tithes of which have not been valued (3 & 4 Vict. c. 69, s. 25);

And enabling the commissioners, where rent-charge has been apportioned on certain tenements of small extent, from which no tithes had been taken for seven years prior to 1836, to cause a new apportionment to be made exempting such tenements (3 & 4 Vict. c. 15, ss. 26, 27).

The Acts also contain provisions enabling the commissioners to define and facilitate the exchange of glebe lands, or lands held by any spiritual person in right of his benefice, or any annual payment or augmentation so belonging to him (5 & 6 Vict. c. 54, s. 5; 9 & 10 Vict. c. 73, s. 22; 23 & 24 Vict. c. 93, s. 41; and 41 & 42 Vict. c. 42, s. 7); the consideration of these, however, would not properly fall within the scope of the present book.

Having now considered certain preliminary matters, we come to the process of commutation itself.

The word "commutation" is not properly applicable to the whole process, though the Acts are entitled Commutation Acts.

The process consists of two distinct operations, first, the "commutation," or ascertainment of the value of the whole of the tithes payable in the parish, and the substitution therefor of an equivalent total sum payable

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annually by way of rent-charge by the whole parish; and secondly, the "apportionment" of this sum, when ascertained, among the various titheable lands in the parish.

It is proposed, therefore, in the remaining sections of this Chapter to give, first, an outline of commutation, properly so called, in ordinary cases; secondly, an outline of apportionment in similar cases; thirdly, to deal separately with certain exceptional cases; and, fourthly, with the expenses of commutation and apportionment.

Sect. II.—*Commutation in Ordinary Cases.*

Commutation might be effected in two ways—

1. By parochial agreement, or
2. Compulsorily by the award of the commissioners.

1. A parochial agreement might be made at a parochial meeting, specially convened with certain formalities (see sect. 17 of the principal Act), by any land or tithe owners interested as to one quarter of the lands or tithes in the parish. At any such meeting, or adjourned meeting (sect. 20), owners of at least two-thirds of the titheable lands, and of at least two-thirds of the great and two-thirds of the small tithes in the parish,[1] being present, might agree for the payment of an annual sum

[1] Sect. 19 of the principal Act provides how the proportionate interest of any land or tithe owner is to be estimated.

by way of rent-charge,[1] variable, as is hereafter[2] explained, with the price of corn, instead of the whole, or of the great, or of the small tithes of the parish.

By sect. 18 of the principal Act, power was given to parochial meetings to make a provisional agreement, which, upon being executed by the required majority of land and tithe owners within six months, became as binding as an agreement duly made at the meeting, and the same is provided in sect. 25 as to agreements pending at the time of the passing of the Act.

In case of any suit pending as to the right to tithes, or any question arising as to the existence of any modus, composition real, or prescriptive or customary payment, or any claim to exemption from, or non-liability to, tithes, or any question touching the situation or boundary[3] of any lands, or any difference arising whereby the making and execution of the agreement might be hindered, power was given by sect. 24 to refer them to arbitration.

All matters in dispute having been settled, the agreement was executed by the parties, and dated the day on which the first signature was affixed. Every such agreement must set forth, either in itself or in some schedule—

(1) All the lands of the parish subject to tithes;

[1] It would seem that in settling the amount of rent-charge the contingent value of tithes, in cases where they are suspended or contingent, in the case, *e.g.*, of glebe or Crown lands, should be added to the value of the other tithes of the parish.

[2] See p. 41.

[3] As to the powers conferred on the commissioners to settle boundaries, see pp. 19—21.

(2) The true or estimated measure of the titheable land which was cultivated as arable, meadow, pasture, wood, common, or in any other way whatsoever;

(3) Whether any modus, composition real, or prescriptive or customary payment was payable instead of any or all of the tithes of the parish, and, if so, which lands or tithes were covered thereby;

(4) Which of the tithes, moduses, &c., were payable to the tithe owner, or to each of several tithe owners, and in what right;

(5) Which, if any, lands in the parish were or had been exempt from payment of any tithes, specifying the tithes and the circumstances of the exemption;

(6) The amount in words of the sum agreed to be paid instead of tithes, moduses, &c., distinguishing, in the case of several tithe owners, the sums payable to each, and in the case of tithes of different lands payable to different tithe owners, or to the same tithe owner in different rights, the sums payable in respect of such different lands; and

(7) All other particulars required by the commissioners, who, by sect. 22, were required to issue forms of agreement.

In all cases where the tithes belonged to an ecclesiastical person in right of any spiritual dignity or benefice, sect. 26 required the agreement to receive the consent in writing under his hand, in the case of an

archbishop or bishop, of the Crown (signified by the Lord High Treasurer or First Lord Commissioner of the Treasury), and in the case of any other incumbent, of the patron or person entitled to the next presentation; and sect. 28 further required that prior to its confirmation by the commissioners it should be submitted to the bishop of the diocese.

After execution the agreement was sent to the commissioners, who, by themselves or some assistant commissioner, inquired whether the agreement had been made without fraud or collusion, and whether or not it ought to be confirmed; and if they were of opinion that it ought, they confirmed it accordingly under their hands and seal, adding the date of the confirmation. The fact and date of this confirmation were then published by them in the parish. Every agreement so confirmed was, by sect. 27 of the principal Act, made binding on all persons interested in the lands or tithes.

2. In default of parochial agreement the commissioners might give a notice of their intention to make an award,[1] and after the expiration of twenty-one days from such notice might proceed to ascertain the total clear annual value of the tithes in the parish. This they did by ascertaining the clear annual value, after deductions for certain expenses of collecting, &c., of the

[1] Even after such notice a parochial agreement might be made at any time prior to the confirmation of the award, and such agreement when confirmed by the commissioners became valid, and rendered null and void all proceedings taken towards making the compulsory award (5 & 6 Vict. c. 54, s. 2).

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tithes of the parish according to the average of seven years preceding Christmas, 1835. In any case, however, where notice might be given them, as required by sect. 28 of the principal Act, that this average value would not fairly represent the sum which ought to be taken for calculating a permanent commutation, they were empowered by that section to add to or deduct from the average value a sum not exceeding one-fifth of such average value; and in the event of the tithes, or any part thereof, having been compounded for or demised to any owner or occupier of the lands during the seven years, or any part thereof, in consideration of any rent or payment instead of tithes, such rent or payment was to be taken as the clear annual value of those tithes for that period.[1]

In estimating the value of the tithes no deduction was to be made for any parliamentary, parochial, county, and other rates, charges, and assessments to which the tithes were liable; and in the case of any rent or payment instead of tithes being paid free from such rates, &c., a sum equivalent to their amount was to be added to such rent or payment before it could be taken as the clear annual value of the tithes (sect. 37 of the principal Act).

If any of the lands in a parish were coppices, sect. 41 of the principal Act empowered the commissioners, upon notice given to them, either by the owner of the coppices, or the owner of the tithes payable in respect of them,

[1] See *Reg.* v. *Tithe Commissioners*, 12 L. J. Q. B. 109.

that the tithes of such lands should be separately valued, to estimate the value of the tithes according to rules laid down by them, but having regard to the average value of the tithes of coppice in that and neighbouring parishes during seven years preceding Christmas, 1835, and estimating it as chargeable to all parliamentary, parochial, county and other rates, charges and assessments to which the tithes were liable, and to add the clear annual value so estimated to the other tithes of the parish.

If any modus, composition real, prescriptive or customary payment was payable instead of any of the tithes of a parish, sect. 44 of the principal Act provided that the commissioners should estimate the amount in the same manner as the amount of the tithes, and add the amount so ascertained to the amount of the tithes of the parish.

If any lands in a parish had during any part of the seven preceding years been exempted from payment of tithes owing to having been enclosed under any Act of Parliament, or converted from barren or waste ground, or from having been parcel of the possessions of any privileged order, or glebe or Crown lands, sect. 43 of the principal Act, and sects. 11 and 12 of 2 & 3 Vict. c. 62 empowered the commissioners, upon notice that the tithes of such lands should be separately valued, to estimate their value, having regard to the average rate awarded, or fixed by voluntary agreement (sect. 4 of 5 & 6 Vict. c. 54), in respect of lands of the like description and quantity in the same and neighbouring parishes, and to add the value so estimated to the other tithes of the parish.

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The commissioners or assistant commissioners having thus ascertained and estimated the total value of the tithes of a parish, framed a draft award containing the same particulars as a parochial agreement.[1] A copy of this award was then deposited in the parish for inspection, and notice given of a meeting to hear objections, if any. Such objections, if any, having been heard and determined, and the award (if necessary) amended, it was signed by the commissioners or assistant commissioners making it and sent to the office of the commissioners, who, having satisfied themselves that all necessary proceedings had been duly observed, confirmed the award under their hands and seal, adding the date of the confirmation, and publishing it in the parish.

Every award so confirmed became binding on all persons interested in the same way as a parochial agreement.[2]

In certain cases of fraud or error sect. 8 of 2 & 3 Vict. c. 62 empowered the commissioners before the confirmation of the apportionment,[3] by a separate award to rectify the agreement or award as might seem just; and power is given them by sect. 3 of 10 & 11 Vict. c. 104, where lands are improperly included or charged with rent-charge in any confirmed instrument of apportionment, to correct it.[4]

[1] See pp. 27—8.
[2] See p. 29.
[3] See p. 36.
[4] See p. 63.

SECT. 3.—*Apportionment in Ordinary Cases.*

The total value of the tithe rent-charge payable in any parish having been ascertained as described in the last section, either by parochial agreement or by award of the commissioners, the majority in number and interest of the landowners or their agents, being present at a parish meeting, which, in the case of commutation by agreement, might be the original, or any subsequent meeting called in like manner, or, in case of a compulsory award, a meeting specially called by the commissioners, might appoint a valuer, or, if the majority in number and interest were unable to agree, an even number of valuers, half chosen by the majority in number, and half by the majority in interest, to apportion the total value, and the expenses of the apportionment, among the various lands in the parish, either upon a basis agreed upon by the meeting, or in default of agreement at his or their discretion, having regard to the average titheable produce and productive quality of the several lands.

If two or more valuers were appointed, they might before they commenced the apportionment appoint an umpire. The valuers or umpire so appointed, and their assistants, were empowered by sect. 34 of the principal Act to enter on any lands for the purpose of making the apportionment, and by sect. 35 to make use of any old maps and plans of the accuracy of which they might be satisfied.

In default of appointment of valuers, and of the

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completion of the apportionment within six months of the confirmation of the agreement or award, the commissioners, or an assistant commissioner, might proceed to apportion the rent-charge agreed or awarded among the several lands in the parish, according to their discretion, in the same manner as valuers appointed by a parochial meeting, giving the lands the full benefit of any modus, composition real, prescriptive and customary payment, and of every exemption from or non-liability to tithes affecting them. To assist them in the apportionment, sect 59 of the principal Act empowered them to appoint surveyors and tithe valuers with the same powers as to entry on lands as was conferred on valuers appointed at a parochial meeting.[1]

Of every apportionment a draft was made, setting forth the agreement or award under which it had been made, and all schedules annexed thereto.

This draft, either in itself or in some schedule, should contain:—

(1) The name and description of the several lands comprised in the apportionment.

(2) The true or estimated quantity of the several lands.

(3) The names and descriptions of the several proprietors and occupiers.

(4) A statement whether the lands were then cultivated as arable, meadow, pasture, wood or common, or in any other way whatsoever.[2]

[1] See last page.

[2] 7 Will. 4 & 1 Vict. c. 69, s. 5, provided that it should be un-

(5) A reference by a number set against the description of the several lands or closes to a map or plan drawn on paper or parchment, in which the lands or closes should be similarly numbered.

(6) The amount charged on the several lands or closes of land.[1]

(7) To whom, and in what right, the amount was in each case payable.[2]

(8) The whole sum agreed or awarded to be paid by way of rent-charge for the parish.[3]

(9) The number of bushels of wheat, barley and oats, ascertained to be the equivalent for such whole sum;[3] *i. e.* the number of bushels of wheat, barley and oats the sum would have purchased at the prices ascertained to have been the average prices for the seven years preceding the passing of the Act 6 & 7 Will. 4, c. 71,

necessary in any case of voluntary apportionment to state in what manner the various lands were cultivated, or the amount charged on the several closes of each landowner, if three-fourths of the landowners interested in the apportionment by writing under their hands should request the commissioners that such statements might be omitted.

[1] See last note; also sect. 21 of 3 & 4 Vict. c. 15 provided that this might be omitted upon the request of the majority in value of the landowners, if valuers had not been appointed prior to the passing of that Act. This apparently applied to voluntary and compulsory apportionments.

[2] Sect. 24 of 2 & 3 Vict. c. 62 provided that in certain cases of difficulty the award might be made to the tithe owner by general description.

[3] Provisions of sect. 4 of 7 Will. 4 & 1 Vict. c. 69 superseding in this respect sect. 57 of the principal Act.

which prices are fixed by 7 Will. 4 & 1 Vict. c. 69, s. 7 at 7*s.* 1½*d.* per bushel for wheat, 3*s.* 11½*d.* for barley, and 2*s.* 9*d.* for oats, provided one-third of the sum were expended in each of the three kinds of corn.

This draft, signed by the person who had made it, was sent together with the map or plan to the office of the commissioners, or some district commissioner, together with proofs that every proceeding incident to the making of the draft had been duly performed. The commissioners then caused a copy of the draft to be deposited in the parish for inspection, and appointed a meeting to hear and determine objections.[1] Having heard and determined these, if any, and amended the draft (if necessary), the commissioners, or assistant commissioner, caused the draft to be engrossed on parchment, and annexed to it the map or plan,[2] and then having signed the instrument of apportionment, and the map or plan, sent them both to the office of the commissioners, who, if they approved the apportionment, confirmed the instrument under their hands and seal, adding the date of the confirmation. If, in any case of voluntary or compulsory apportionment, or of an

[1] In case one landowner was seized of all the lands, not glebe, of the parish these formalities were unnecessary if the apportionment was made in consequence of a parochial agreement (7 Will. 4 & 1 Vict. c. 69, s. 6).

[2] The commissioners are empowered by sect. 26 of 23 & 24 Vict. c. 93 to order maps to be detached from instruments of apportionment where from their size or any other cause they deem it expedient.

agreement for giving land in lieu of tithes,[1] the commissioners should not be satisfied of the accuracy of the map or plan, they were empowered by sect. 1 of 7 Will. 4 & 1 Vict. c. 69, and sect. 22 of 2 & 3 Vict. c. 62 to refrain from signing or sealing it, in which case they were to certify on it that it was the map or plan referred to in the instrument of apportionment or agreement.[2]

Of this confirmed instrument of apportionment, and of every confirmed agreement for giving land in lieu of tithes or rent-charge, two copies are required by sect. 64 of the principal Act to be made and sealed with the seal of the commissioners. One of these is to be deposited with the registrar of the diocese in which the parish is situated, to be kept among the records of the registry; the other, with the incumbent and church—or chapel—wardens of the parish, or some other fit persons approved by the commissioners, to be kept with the public books and papers of the parish; but if such custody is alleged to be inconvenient to the majority of the persons interested, or otherwise inconvenient or unsafe, power is given by sect. 17 of 9 & 10 Vict. c. 73 to any person interested in the lands or rent-charge to apply to quarter sessions for an order for the deposit of the copy in a more convenient or secure custody or place. Of this application fourteen days' notice in

[1] See Chap. V. pp. 68, *et seq.*

[2] It appears by implication from this section that the commissioners were to sign and seal the map or plan as well as the instrument of apportionment (see too p. 40).

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writing must be given to the persons in whose custody the copy is deposited at the time of the application. The Court of Quarter Sessions may, upon hearing the application, order the copy to be removed from the custody objected to, and deposited in such custody as the Court may think fit. The costs of the application and of any opposition to it are in the discretion of the Court. To this copy all persons interested may have access for the purpose of inspection on payment of 2*s.* 6*d.*, and are entitled to be furnished with copies of or extracts from it, upon paying for them at the rate of 3*d.* for every folio of seventy-two words. Again, 5 & 6 Vict. c. 54, s. 13 empowered boards of guardians of parishes and unions, with the consent of the poor law commissioners, to pay out of the rates the cost of making the map or plan, with a view to its use by them in estimating the net annual value of property in respect of which rates might be assessed for the relief of the poor. The commissioners having certified in writing that such cost has been paid, the overseers of the parish, or any officer of the board of guardians, or any person authorized in writing by the overseers or board, is entitled to inspect, take copies of, and make extracts from the map or plan free of charge.

If at any time any sealed copy of a confirmed instrument of apportionment is in the possession of any person who is not legally entitled to it, any two justices of the peace in whose jurisdiction the lands mentioned in the instrument are situated are empowered by sect. 28 of 23 & 24 Vict. c. 93, upon the application of any person

interested in the lands or rent-charge, and upon fourteen days' notice in writing of the application[1] to the person or persons in whose custody the copy is at the time of the application, to hear and determine it. They may then order the copy to be removed from the custody in which it is, and to be deposited in such custody as they think fit; they may also impose a fine not exceeding twenty shillings for each day that the copy is retained contrary to the terms of their order, and the costs of the application and the fine and any opposition to it are in their discretion.

Finally, the commissioners are empowered by sect. 27 of 23 & 24 Vict. c. 93 to recopy or restore any instrument of apportionment, or any portion thereof, which may have become damaged or defaced, certifying such copy or restoration under their hands and seal.

No agreement, award, or apportionment, having been confirmed as above provided, or purporting to be so confirmed, can be impeached by reason of any mistake or informality in itself, or in any proceeding relating thereto, but is valid in all respects, subject to any powers given to the commissioners to alter it (sect. 64 of the principal Act, and 10 & 11 Vict. c. 104, s. 2);[2] and by

[1] The application of which notice is to be given must be an application which has already been made, *i. e.*, the application must first be made to the justices, and then fourteen days' notice of it given before it can be heard and determined (*Reg.* v. *Sayers*, 3 L. T. N. S. 405).

[2] See Chap. IV. pp. 59, *et seq.* In spite of this provision it was held, in *Clarke* v. *Yonge* (5 Beav. 523), that questions between rival claimants to tithe rent-charge where, by mistake, the title of one claimant had

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sect. 34 of 23 & 24 Vict. c. 93, where land has been made chargeable with rent-charge in lieu of tithes for more than one parish, they are empowered to determine in respect of which parish the rent-charge should have been charged, and to order it to be paid in respect of that parish only.

Every recital or statement in an apportionment or agreement for giving land, or in any sealed copy thereof, and any map or plan annexed to such apportionment or agreement or copy, if signed and sealed by the commissioners, is made by sect. 64 of the principal Act satisfactory evidence of the matters therein recited or stated, or of the accuracy of the map or plan;[1] but sect. 1 of 7 Will. 4 & 1 Vict. c. 69 provides that in no case where the map or plan, as well as the instrument, is not signed and sealed by the commissioners,[2] shall any recital of the quantity or admeasurement of lands, or any map or plan annexed to any such instrument, or any copy thereof, be deemed evidence of the quantity of land referred to in it, or of the accuracy of the map or plan.

not been brought before the commissioners at the time of commutation, could still be raised in a court of law (see, too, *Morris* v. *Duke of Norfolk*, 9 Sim. 493).

[1] The section only uses the word "plan," but it is evident from the context that "map" is also intended.

The map is not receivable in evidence as showing the boundary of land in a case of disputed title (*Wilberforce* v. *Hearfield*, 5 Ch. D. 709). See, however, *Giffard* v. *Williams*, 38 L. J. Ch. 597, where a properly authenticated tithe commutation map was received in evidence to prove plaintiff's title in a partition action.

[2] *E. g.*, in the case of their not being satisfied as to its accuracy, see p. 37.

After the confirmation of the instrument of apportionment, the lands of the parish comprised in it became discharged from the payment of all tithes, and, in lieu thereof, a sum of money in the nature of a rent-charge issuing out of the lands is payable. The amount of the sum payable in any given year is ascertained by taking the number of bushels of wheat, barley, and oats fixed in the instrument of apportionment,[1] and then seeing how much money such number of bushels of each kind would fetch at the average prices of the past seven years as advertised in the *London Gazette* in January of each year pursuant to sect. 10 of 45 & 46 Vict. c. 37.[2] The sum thus ascertained is the amount payable for that year.

The provisions of the statutes 4 & 5 Will. 4, c. 22, and 33 & 34 Vict. c. 35 as to the apportionment of periodical payments apply to all rent-charges for which tithes have been commuted; and where any lands were exempt from the payment of tithes whilst in the occupation of the owner by reason of being glebe, or parcel of the possessions of some privileged order, or Crown lands, the like exemption extends to the rent-charge. (Sect. 71 of the principal Act, and 2 & 3 Vict. c. 62, s. 12.)

[1] See p. 35.

[2] Repealing sect. 56 of the principal Act.

Chap. II. Sect. 4.

SECT. 4.—*Commutation and Apportionment in certain exceptional Cases.*

1. Under sects. 38 and 39 of the principal Act the commissioners had power to reserve for separate adjudication any case where they might suspect fraud or collusion, or in which, by reason of the length of time which had elapsed since the making of any composition then in force, or by reason of the peculiar interest in the lands or tithes of either of the parties to any composition, or by reason of any other special circumstance, they considered a separate adjudication desirable. Such special adjudication having been made with certain formalities required by the Act, the award was to be published and confirmed as in the case of an ordinary award.[1]

2. Under sect. 58 of the principal Act the valuers or commissioners, or assistant commissioner, as the case might be, had power to make a special apportionment at any time before the confirmation of the apportionment by apportioning, at the request of any landowner, the whole rent-charge intended to be charged upon any lands of such landowner held under the same title and for the same estate in the same parish, specially upon the several closes or portions of such lands, or according to an acreable rate or rates upon lands of different quality, in such manner and proportion, and to the exclusion of such of them, as the landowner, with the consent of the person entitled to the rent-charge, might direct; but no close of

[1] See p. 32.

land was to be charged with any rent-charge or share of rent-charge on account of the tithes of any other lands, unless the value of the lands to be charged should be at least three times the value of the whole rent-charge upon them.[1]

3. Under sect. 9 of 7 Will. 4 & 1 Vict. c. 69, in all cases where the same person or body was not entitled to all the tithes of the parish, and the lands out of which each such person or body was entitled to tithes were not clearly defined, or where the lands lay dispersedly throughout the parish, power was given to the land and tithe owners by agreement, with the consent of the diocesan and patron of the living when any tithes payable to a spiritual person in right of his benefice were in question, or in default of such agreement to the commissioners by award, as might seem to them convenient, (but so that no land should be charged with more than its due proportion,) to fix and apportion the rent-charge payable to the several persons or bodies upon particular lands. Every such agreement or determination of the commissioners, when confirmed by them, became conclusive against all persons.

[1] The section runs, "that no close of land shall be charged with any rent-charge on account of the tithes of any other lands, unless the value of such lands shall be at least three times the value of the whole rent-charge upon such lands." If taken in its strictly grammatical sense this would mean that the value of the lands in respect of which the rent-charge is to be charged upon any close of land must be three times the value of the rent-charge upon those lands, which would be meaningless and absurd. The meaning adopted in the text seems to be the more correct and reasonable one.

Chap. II. Sect. 4.

4. Under sects. 11 and 12 of 2 & 3 Vict. c. 62, where lands were partially exempt from payment of tithes, or rent-charge in lieu thereof, by reason of having been parcel of the possessions of any privileged order[1] or Crown lands, and under sect. 14 of 3 & 4 Vict. c. 15, where by reason of lands being partially exempted from the payment of tithes by custom or otherwise, or by being subject to a shifting or leaping modus, or other customary payment, or payment rendered[2] due only on certain contingencies, a contingent rent-charge had been, or might be fixed in respect of such lands, the owners of the lands and of the tithes or rent-charge might, by the parochial agreement, or by a supplemental agreement where a parochial agreement or any award had been previously confirmed, agree upon, or the commissioners might, with the consent of the owners of the lands and tithes, at any time before the confirmation of the apportionment of any rent-charge, by an award or supplemental award[3] determine a fixed and continuing rent-charge instead of the contingent tithes or rent-charge. Upon the confirmation of the agreement or award the lands are discharged from the contingent

[1] It is worthy of notice that church or glebe lands are omitted here, though they are partially exempt in the same way.

[2] The section runs "where by reason of lands being partially exempted from the payment of tithes . . . by being subject to a shifting or leaping modus, or other customary payment, or rendered due only on certain contingencies, &c." . . . This is ungrammatical, there being no substantive to which "rendered due" can refer. It is clear that some such word as payment must be understood.

[3] The power to make a supplemental award does not appear in sect. 11 of 2 & 3 Vict. c. 62.

tithes or rent-charge. Cases of prescription relating to woodlands are expressly excepted by sect. 14 of 3 & 4 Vict. c. 15 from its operation.

5. Sect. 13 of 2 & 3 Vict. c. 62, extended by sect. 15 of 3 & 4 Vict. c. 15, provided, in the case of lammas lands[1] and lands subject to a personal right of common, or right of common in gross vested in certain persons by reason of inhabitancy, or occupation, in the parish where such lands lay, if the right of common was not annexed or appurtenant to or arising out of any lands on which any rent-charge could be fixed, that at any time before the confirmation of the apportionment the parties interested in the lands or commons and the tithes thereof might, by the parochial agreement, or by a supplemental agreement subsequent to a parochial agreement or to an award, or the commissioners might, by their award, or by a supplemental award subsequent to their award or to a parochial agreement,[2] fix a rent-charge instead of the tithes of the lammas lands or commons to be paid during their separate occupation by the separate occupiers. The agreement or award must declare a sum or rate per head to be paid for each head of cattle or stock turned on to the lammas lands or com-

[1] Lammas lands are lands held in severalty during a portion only of the year, *i. e.*, from Candlemas to Lammas (February to August), and during the remainder open to all persons having common rights of pasturage, &c. over them.

[2] Where the commissioners intended to proceed by a supplemental award subsequent to a parochial agreement, they were to give the same notice as in the case of an original award (3 & 4 Vict. c. 15, s. 16).

mons. Every such sum or rate is payable by the owner of the cattle or stock upon its being turned on the lands or commons, and any arrears may be recovered by distress and by impounding any cattle, goods, or chattels belonging to the person in respect of whose cattle or stock the sum or rate is in arrear, in the same way as if they were arrears of rent.

Again, by sect. 18 of 23 & 24 Vict. c. 93 the commissioners are empowered, by supplemental award and apportionment upon the written application of any person entitled to receive, or any person liable to pay it, to convert into a gross rent-charge any sum or rate per head, for which tithes have been commuted, payable for each head of cattle or stock turned upon land which is subject to common rights or held or enjoyed in common during the whole year.

6. Under sect. 16 of 9 & 10 Vict. c. 73, where after any confirmed agreement or award settling the rent-charge in lieu of the tithes of any parish, but prior to the confirmation of the apportionment, it appeared to the commissioners that by reason of any doubt which had then arisen or existed in respect of any actual or supposed exemption from tithes, modus, composition real, or prescriptive or customary payment, or by reason of any other question or doubt applicable to a part only of the lands of the parish, or by reason of any question or doubt touching the boundaries of the parish, it could not be immediately ascertained whether the agreement or award might require rectification in respect of such matters, the commissioners had power to declare by way

of supplement to the agreement or award that the lands to which the doubt or question applied should be considered a separate district for commutation, and that the residue of the parish should remain subject to the agreement or original award, with any variations they might direct in the award by way of supplement. Every such award by way of supplement is subject to the same provisions as separate awards under statute 2 & 3 Vict. c. 62.

7. Sect. 19 of 23 & 24 Vict. c. 93 empowers the commissioners in any case where a gross rent-charge has been made payable in respect of a gated or stinted pasture,[1] and the gates or stints [1] are rated to the relief of the poor, upon the written application of the person entitled to the rent-charge, or of any owner of a gate or stint, by the instrument of apportionment, or by a supplemental award and apportionment, to apportion the gross rent-charge *pro ratâ* upon the gates or stints.

The owner of the gross rent-charge so apportioned has the same powers for the recovery of any arrears by distress on the goods and chattels of the person rated to the relief of the poor in respect of the gates or stints, the rent-charge upon which is in arrear, as an owner of rent-charge in lieu of tithes has for the recovery of arrears of rent-charge;[2] but in this case the power of

[1] A gate or stint is the right of each person who has a share in a gated or stinted pasture, *i. e.*, grazing land on a moor, down or waste, which produces no crop, and which is open to each such person for the pasturage of a stinted or limited number of cattle (see Elton on Commons).

[2] See pp. 96—102.

Chap. II. Sect. 4.

distress may be exercised upon the goods and chattels wherever found.

SECT. 5.—*Expenses of Commutation and Apportionment.*

The expenses considered in this section include all allowances to and expenses of land surveyors and tithe valuers, and all other expenses incident to the making of any award or apportionment, or of the annexed map or plan, or of any copies of them. They do not include the salary or allowance to any commissioner or assistant commissioner, which are paid by the Treasury (sect. 7 of the principal Act), nor any expenses which the commissioners or an assistant commissioner or the Court or an arbitrator may be authorized to order and may have ordered to be otherwise paid (sects. 74 and 75 of the principal Act), nor the cost of the employment of a solicitor by the landowners of a parish to conduct proceedings under the Act (see *Hinchliffe* v. *Armistead*, 9 M. & W. 155).

The expenses under consideration may fall upon different persons in the cases of an award and an apportionment.

1. In the case of an award, sect. 74 of the principal Act, as amended by sect. 23 of 2 & 3 Vict. c. 62, provides that they shall be borne by the persons interested[1]

[1] Under the principal Act the power could only be exercised among the land and tithe "owners." This was found to work injustice in certain cases of sub-leasing, and, therefore, the words were extended to cover all persons interested in any way in the lands or tithes.

in the lands and tithes comprised in the award in such proportion, within such time, and in such manner as the commissioners may direct.

2. In the case of an apportionment, sect. 75 of the principal Act, as amended by sect. 23 of 2 & 3 Vict. c. 62, provides that they shall be borne by the persons interested [1] in the lands included in the apportionment in rateable proportion to the rent-charge charged on the lands by the apportionment.

The commissioners having decided the amount of expenses to be borne by each of the several land and tithe owners, the following powers are given to owners of limited estates in lands or tithes to charge the amount to be borne by them on the land or rent-charge.

1. Under sect. 77 of the principal Act every owner of an estate in lands [2] or tithes less than an immediate estate of fee simple or fee tail, or whose lands or tithes are settled upon any uses or trusts,[3] may, with the consent of the commissioners, and in such manner as they may direct, charge the whole or any part of the expenses

[1] See note on last page.

[2] By sect. 23 of 3 & 4 Vict. c. 15 the word "lands" includes any income or sum receivable by or accruing to any such owner from redeemed land tax, or from fines or other sums of money payable on the renewal of any term of estate in lands, tithes, or rent-charge held of or by him to the same uses and upon the same trusts as the lands, tithes or rent-charge in respect of which the expenses are incurred.

[3] The section runs ". . . that every owner of an estate in land or tithes less in the whole than an immediate estate of fee simple or fee tail, or which shall be settled upon any uses or trusts." This is clearly ungrammatical, some such words as "whose lands" should take the place of "which."

Chap. II. Sect. 5.

to be borne by him, with interest at four per cent., on the lands or rent-charge; provided that the charge upon the lands or rent-charge is lessened every year by one-twentieth of the whole original charge.

This power is extended by sect. 16 of 2 & 3 Vict. c. 62 to the case of expenses payable by any corporate body or person, master or fellows of any college, dean and chapter of any cathedral or collegiate church, master or guardian of any hospital, parson, vicar, or any other having any spiritual or ecclesiastical living, whether seised in fee or for a limited estate; and sect. 23 of 3 & 4 Vict. c. 15 provides that the power may be exercised by any owner of lands in respect of which tithes are payable to him.

2. Under sect. 17 of 2 & 3 Vict. c. 62 any corporation aggregate or any collegiate body may, with the consent of the commissioners under their hands and seal, charge the amount on any other lands[1] held by them to the same uses or on the same trusts as the lands in respect of which the expenses were incurred.

3. Every ecclesiastical beneficed person[2] may, under sect. 78 of the principal Act, advance or borrow the whole or any part of the expenses to be borne by him, and may charge or assign the rent-charge as a security for their repayment for twenty years, or until the sum

[1] See note (2) on last page.

[2] In case any spiritual person dies or vacates his benefice before exercising the power of borrowing and charging his rent-charge, the commissioners, with the consent of the ordinary, are empowered to do so by 5 & 6 Vict. c. 54, s. 8.

advanced or borrowed, with interest at four per cent., and the expenses of the charge or assignment, are paid off. The sum to be advanced or borrowed must be ascertained by a commissioner or assistant commissioner, and certified under his hand as the amount of the expenses properly incurred by the ecclesiastical beneficed person. Each successive incumbent must pay the interest as it becomes due, or within one calendar month afterwards, and also an instalment of five per cent., or one twentieth, on the principal sum advanced or borrowed. Upon each payment on account of principal the interest is proportionately reduced.

In default of payment by the incumbent, the ordinary may sequester the profits of the benefice until the payment is made.

Since the provisions of 2 & 3 Vict. c. 62, s. 16, above referred to,[1] it is doubtful how far the power given by this section is necessary, but it differs in that it allows an assignment of the rent-charge.

In default of payment by the person liable, the expenses can be recovered either—

1. In the case of expenses payable by owners of lands in the same way as rent-charge in arrear[2] (2 & 3 Vict. c. 62, s. 18); or
2. By a distress warrant issued by two justices of the peace in whose jurisdiction the lands concerned are situated, upon production to them of a certificate, signed by a commissioner or assistant

[1] See last page.

[2] See pp. 96—102.

commissioner, certifying the amount to be paid by the person against whom the distress warrant is to issue. This certificate can be granted by any commissioner or assistant commissioner when any difference arises as to the expenses, or the share of them, to be paid by any person, and seems to be an essential condition precedent to the issuing of the distress warrant.

Any occupier whose lands or goods are liable to distress in respect of any expenses chargeable upon his landlord or lessor, is entitled to recover any amount he may pay, with interest at four per cent., and may deduct it from any rent or renewal fines payable to his landlord or lessor. The landlord or lessor, if his estate in the lands is less than an estate of fee simple or fee tail, or is subject by a settlement to any uses or trusts, may charge the amount and interest upon the estate as above pointed out with reference to expenses.[1]

[1] See pp. 49—51.

CHAPTER III.

CHARGES UPON THE RENT-CHARGE.

By sect. 69 of the principal Act every rent-charge in lieu of tithes is subject to all parliamentary, parochial, and county and other rates, charges, and assessments to which the tithes commuted for it were liable.

The following, if not an exhaustive list, at all events contains the main charges upon the rent-charge by virtue of the above section.

1. Poor rate under 43 Eliz. c. 2, s. 1, including also county rate under 15 & 16 Vict. c. 81, borough rate under sect. 45 of the Municipal Corporations Act, 1882, highway rate under 5 & 6 Will. 4, c. 50, s. 27, school board rate under 33 & 34 Vict. c. 75, and any other rates and expenses provided by statute to be collected with and payable out of the poor rate.[1]

This rate is to be made on the net annual value of the rent-charge, *i.e.*, what the rent-charge would let for to a hypothetical tenant from year to year, free from all usual tenant's rates and taxes, and deducting from this hypothetical rent—

(1) All expenses of collection, including legal expenses;

[1] See *Farmer* v. *L. & N. W. Ry. Co.*, 20 Q. B. D. 788.

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(2) Losses by ultimate non-payment;
(3) Ecclesiastical dues, first fruits and tenths;
(4) The profit (if any) which the hypothetical tenant might be expected to look for beyond the remuneration for his trouble in collecting.[1]

The following would fall under the head of tenant's rates, and would therefore have to be allowed for in estimating the net annual value:—

(1) Poor rates, including county, highway, and school board rates;
(2) Income tax under Schedule B.;
(3) General rate under Metropolis Local Management Act;
(4) Lighting rate;
(5) General district rate under the Public Health Act, 1875;
(6) Rate for public libraries and museums.

2. Land tax (if not redeemed) under 38 Geo. 4, c. 5, s. 4, except in the case of rent-charge belonging to small livings exonerated from land tax under the statutes of Geo. III. It is usually assessed upon the basis of the poor rate valuation.

3. Property or income tax under 16 & 17 Vict. c. 34, scheds. A. and B., on the annual value of the rent-charge as defined in 5 & 6 Vict. c. 35, sched. A. No. 1, *i.e.*, on the amount for which the rent-charge would let by the year at a rack rent, which would be the amount of rent-

[1] See *Reg.* v. *Capel*, 12 Ad. & E. 382; *Hackney and Lamberhurst Commutation*, 1 E. B. & E. 1; and *Reg.* v. *Inhabitants of Sherford*, L. R. 2 Q. B. 503.

charge the tithe-owner actually receives after deducting the necessary and reasonable expenses of collection.[1] From this annual value, again, are to be deducted tenths and other ecclesiastical dues, repairs of chancel, parochial rates, taxes and assessments, and land tax (if any) (5 & 6 Vict. c. 35, sched. A. No. 5, and 16 & 17 Vict. c. 34, s. 32).

4. General district rate under 38 & 39 Vict. c. 55 (Public Health Act, 1875), in any urban district, upon one quarter of the net annual value of the rent-charge; and in any rural district the rate for general expenses, which is payable out of the poor rate, and any rate for special expenses, including expenses under Allotments Acts, chargeable upon one-fourth of the net annual value.

5. General rate under 18 & 19 Vict. c. 120, s. 161 (the Metropolis Local Management Act), upon the net annual value, as the poor rate.

6. Lighting rate under the same section of the same Act, and 3 & 4 Will. 4, c. 90.

7. Rate for public libraries and museums.

These rates, charges, &c., are assessed either—

(1) Upon the occupier of the lands charged with the rent-charge under sect. 70 of the principal Act; or

(2) Upon the owner of the rent-charge under sect. 8 of 7 Will. 4 & 1 Vict. c. 69.

1. If assessed upon the occupier of the lands, in de-

[1] *Stevens* v. *Bishop*, 19 Q. B. D. 442; C. A., 20 *id.* 442.

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fault of sooner payment of them by the owner of the rent-charge, they may be recovered from the occupier in the same way as poor rate assessed on him.

Any occupier who holds under a landlord, and pays them, may deduct the amount so paid from his rent; and any landlord or owner, who is also occupier, who has paid them, or from whose rent they have been deducted, may deduct the amount from the rent-charge, or recover it by action from the owner of the rent-charge, under sect. 70 of the principal Act, which further enables the owner of the rent-charge to inspect and take copies of every assessment containing such rate or charge, and to appeal against the assessment, as any occupier or rate-payer can in the case of poor rate.

2. Where they are assessed upon the owner of the rent-charge, they may also, in default of payment by him, be recovered from any one or more of the occupiers of the lands out of which the rent-charge issues, in the same way as poor rate assessed upon them, subject to the following conditions:—

(1) Notice in writing must have been given to the occupier twenty-one days previous to any of the half-yearly days of payment of the rent-charge.

(2) No occupier is liable to pay at any one time, in respect of such rates, &c., any greater sum than the amount of the rent-charge payable in respect of the lands occupied by him for the current half-year in which the notice is given.

There seems to be no authority for saying that these two conditions apply where the assessment is made on the occupier of the lands.

Any land-owner or tithe-owner is empowered by sect. 3 of 2 & 3 Vict. c. 62 to give a notice in writing signed by him to the assessor or collector of any rate or tax in which he may be interested, requiring him to specify within forty days in his assessment made for the purpose of collecting and levying such rate or tax—

1. The names of the several occupiers of tithes, lands, and tenements subject to the rate or tax, and
2. The sum assessed on the tithes, lands or tenements held by each occupier.

Again, by sect. 71 of the principal Act the rent-charge is subject to the same charges or incumbrances as the tithes commuted for it were; and by sect. 4 of 2 & 3 Vict. c. 62, where the whole of the great tithes, or the whole of the small tithes, or the rent-charge for which they have been commuted, are subject to any such[1] charge, incumbrance or liability, power is given to the person entitled to the tithes or rent-charge, with the consent of the commissioners, and of the bishop of the diocese, specially to apportion the charge, incumbrance or liability on any part of the tithes or rent-charge which, in the opinion of the commissioners, is

[1] The use of the word "such" in this section is clearly ungrammatical. It cannot refer to the preceding section as that deals with rates and taxes. Probably the draftsman had sect. 71 of the principal Act before him, and the word such refers to that section.

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equal to at least three times the value of the charge, incumbrance, or liability apportioned on it. The expenses of any such apportionment are to be borne by the person at whose instance it is made, and are recoverable from him as the costs of an ordinary apportionment.[1]

[1] See p. 51.

CHAPTER IV.

ALTERATION OF APPORTIONMENTS.

THE apportionment, though final when made by the commissioners, may, under certain circumstances, be altered from time to time. It is proposed in this Chapter to state what those circumstances are.

1. If the owner of any lands desires it, the Commissioners of Land-tax for the county or place where the land is situate, or any three of them, with the consent of two magistrates in whose jurisdiction it is, or the commissioners without any such consent, may, under sect. 72 of the principal Act, and sects. 14 and 15 of 5 & 6 Vict. c. 54, alter the apportionment in such manner as the landowner directs. The altered apportionment must be made by an instrument in writing under the hands and seals, in the first case, of the Land-tax Commissioners, the landlord and the magistrates; and in the second case, of the commissioners.

Three counterparts are to be made, and of these two are to be sent—one to the registrar of the diocese, and the other to the other person who has the custody of the copy of the original instrument of apportionment. These two counterparts are to be annexed as amendments to the copies of the original instruments. The

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third counterpart is to be sent to or retained by the commissioners. All the expenses of the alteration are to be borne by the landowner.

The alteration must be made subject to the provisions contained in sect. 58 of the principal Act, that no close of land is to be charged with any rent-charge, or share of rent-charge, on account of the rent-charge of any other lands, unless the value of the lands so to be charged is three times the value of the whole rent-charge intended to be charged upon it, and to that contained in sect. 13 of 23 & 24 Vict. c. 93, that no land is to be charged with rent-charge payable to a different owner than the rent-charge previously charged on it without his consent. Again, sect. 14 of 5 & 6 Vict. c. 54 provides that no subdivision of any rent-charge so made shall be less than five shillings.

2. If at any time after the confirmation of any instrument of apportionment lands charged with one entire rent-charge have become vested in several owners, and any of these owners are desirous that the apportionment shall be altered, the Commissioners of Land-tax, or any three of them, with the consent of two magistrates (as in 1), or the commissioners, have power under sect. 14 of 5 & 6 Vict. c. 54, as amended by sect. 10 of 23 & 24 Vict. c. 93, to alter the apportionment in such manner and in such proportions as may seem just to them, but so that no division of any rent-charge shall be less than five shillings.

In the event of all the landowners interested in the alteration not signifying their consent the commissioners

must cause a draft to be prepared of the proposed altered apportionment, which must be deposited for inspection, as in the case of an original instrument of apportionment,[1] and must then cause notice of the deposit to be given in such manner as they may think fit, specifying a time, not less than twenty-one days, within which objections may be signified to them in writing. In case any objection is received they must appoint a time and place for hearing it. Chap. IV.

Having determined the objections (if any), or if there is no objection received, the commissioners may confirm the altered apportionment, either with or without amendment.

It is to be noted that in this case the provision of sect. 58 of the principal Act does not apply as in 1, but that of sect. 13 of 23 & 24 Vict. c. 93 does.[2]

The alteration of the apportionment must be made, the counterparts deposited, and the expenses paid, as in 1.[3]

3. Where lands charged with rent-charges or portions of rent-charges under confirmed instruments of apportionment are inclosed, divided, allotted, or exchanged by agreement or award made under the powers of any general or local Act of Inclosure or otherwise, so that the apportionment appears to the commissioners to be inconvenient with reference to the altered distribution of the lands, they are empowered by sect. 13 of

[1] See p. 36.
[2] See last page.
[3] See pp. 59, 60.

Chap. IV. 9 & 10 Vict. c. 73, upon the application of the owners of the lands, or a majority in number and value of them, or of any person or persons entitled to the rent-charges or any portions of them, to make or confirm an altered instrument of apportionment, so that the rent-charges or portions of rent-charges originally charged on the several portions of land, which have been taken or allotted away from the former owners on the inclosure, division, allotment, or exchange, may be charged on the lands allotted to or received by the former owners by way of substitution or compensation. This altered apportionment is to be confirmed under the hands and seal of the commissioners, and then becomes a valid amendment of the original apportionment.

The expenses of and incident to this alteration are to be borne by the owners of the lands affected by it, and are recoverable in the same way as expenses of and incident to an original apportionment.[1]

4. Sect. 15 of 9 & 10 Vict. c. 73 provides that where, after the confirmation of any apportionment, it appears that some tithes included in the total tithes, in respect of which the rent-charge has been agreed or awarded to be paid, were—

(1) not held by the person to whom the rent-charge was agreed or awarded to be paid; or

(2) not held by him in the same right and for the same estate; or

(3) not subject, after the determination of his estate, to the same limitations or estates;

[1] See p. 51.

the commissioners may either (*a*) in pursuance of a decree or direction of the Court, or (*b*) on the application in writing of the parties, who, had there been no commutation, would have been the owners of all the tithes included in the total amount, make or confirm a supplemental award or apportionment of the rent-charge in such manner that separate rent-charges or portions of rent-charges may be made payable to the parties who would have been owners of the tithes; and they may, if they please, award to be paid to one of the respective owners, or to the owner in lieu of one of his respective rights, the whole of any rent-charges payable under the original instrument of apportionment out of specific lands, instead of dividing each rent-charge among the different owners. This supplemental award and apportionment, when confirmed under the hands and seal of the commissioners, takes effect from the next half yearly day of payment.

5. If any lands have been improperly included or charged with rent-charge in any confirmed instrument of apportionment, sect. 3 of 10 & 11 Vict. c. 104 empowers the commissioners to correct such apportionment and the deposited copies thereof, either (1) by excluding the lands improperly charged from the apportionment, and redistributing[1] any rent-charge imposed on those lands upon the lands properly liable to the payment thereof, or (2) by sanctioning the redemption of the rent-charge.[2]

[1] Subject to the provision of 23 & 24 Vict. c. 93, s. 13, see p. 60.

[2] See p. 87.

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All the incidental costs and expenses of this correction are to be borne by such persons, and in such proportions, as the commissioners may direct, and are recoverable in the same manner as expenses of and incident to original instruments of apportionment.[1]

The person or persons having the custody of any instrument of apportionment are bound by sect. 4, upon the application of the commissioners, to deliver to them the copy for the purpose of correction.

6. Sect. 11 of 23 & 24 Vict. c. 93. enables the commissioners, with the consent of the owner or owners of any lands charged with rent-charge under any instrument of apportionment, whether payable to one or more owners of rent-charge, and without regard to the mode of its apportionment, to re-apportion and re-distribute, subject to the provision of sect. 13,[2] the rent-charge by an altered apportionment over and amongst the same lands, or any part of them, and to the exclusion of any of them; but no rent-charge may be charged upon any land to the exclusion of other land of the same owner, unless both lands are settled to the same uses, or the land so charged is held for an estate in fee simple or tail in possession.

There seems here to be no limit as to the value of the land to be charged, such as that in sect. 58 of the principal Act.[2]

7. By sect. 15 of 23 & 24 Vict. c. 93, the commis-

[1] See p. 51.
[2] See p. 60.

sioners are given power, whenever any instrument of apportionment appears to be so altered by successive instruments of altered apportionment as to render the collection of the rent-charge unreasonably inconvenient or difficult,[1] upon the application[2] of the person or persons entitled to the rent-charge, or any part of it, without any notice or any consent of any of the owners of the lands, to make a further instrument of altered apportionment as regards the whole or any portion of the lands charged, provided that they make no alteration in the amount charged on the lands of any particular owner. This altered apportionment becomes an amendment of and substitution for the original and altered apportionments, so far as they are affected by it.

8. Sect. 16 of 23 & 24 Vict. c. 93 empowers the commissioners when, in consequence of any new boundaries of parishes being set out on any inclosure or otherwise, they consider the apportionment of the rent-charge in those parishes rendered inconvenient, either (1) to make and confirm an altered instrument of apportionment adapted to the altered circumstances; or (2) to declare by an order under their hands and seal the lands affected by the alteration of boundaries, with or without any other lands comprised in the enclosure, and whether the lands are situate in one or more parishes, to be a "separate district;" and may make and confirm an altered instrument of apportionment

[1] The existence of "unreasonable inconvenience and difficulty" is apparently a question for the commissioners.

[2] Apparently the application need not necessarily be a written one.

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adapted to the altered distribution of the lands, with reference both to the landowners and rent-charge owners in the district; and may fix and apportion the amount of rent-charge payable to each of the rent-charge owners in the district upon such particular lands as may seem convenient to them; provided that no lands are charged with more than their due proportion of rent-charge, or are charged with rent-charge payable to a different owner than the rent-charge previously charged on them was payable without his consent. In this second case the altered apportionment, when confirmed, is to be annexed to the original apportionment for that parish from which the greatest amount of rent-charge is payable under the altered apportionment, and counterparts are to be annexed to the original apportionment for each of the other parishes in the "separate district," and copies are to be deposited in respect of each parish as in 1.[1]

9. Where, through the removal or alteration of fences between land subject to and land free from tithe or rent-charge, it is impossible or difficult to distinguish the limits of the land charged, and the lands are held for an estate of fee simple or tail, or are settled to the same uses, sect. 12 of 23 & 24 Vict. c. 93 empowers the commissioners, with the consent of the owner of the lands, to include the whole of the lands in any instrument of altered apportionment,[2] and to apportion the

[1] See p. 59.

[2] It is questionable if this section in terms authorizes an altered apportionment being expressly made, and whether it was not intended merely to apply to a case where an altered apportionment was otherwise being made.

rent-charge on the land previously free, or any part of it.

10. Under sect. 25 of 23 & 24 Vict. c. 93, where lands in respect to the cattle or stock upon which a sum or rate per head is payable are inclosed, divided, allotted, or exchanged, under the powers of any general or local Act of inclosure or otherwise, the commissioners may, by an altered apportionment, adapted to the altered distribution of the lands, charge a rent-charge, equivalent to the amount of the sum or rate per head previously payable, upon the lands allotted, in lieu of the rights in respect of which the sum or rate per head was payable.

CHAPTER V.

DISCHARGE OF LAND FROM LIABILITY TO TITHES OR TITHE RENT-CHARGE BY GIVING LAND IN LIEU THEREOF.

THERE are six ways in which land may be discharged from tithes or tithe rent-charge by the giving of land.

1. Under sects. 29 and 30 of the principal Act a parochial agreement, made in similar manner and form to a parochial agreement for commutation, may give to any ecclesiastical owner of any tithes, or rent-charge in lieu of tithes, in right of any spiritual benefice or dignity, any quantity of land not exceeding twenty acres by way of commutation for the whole or any portion of the tithes or rent-charge. Every such agreement must fulfil the following conditions:—

(1) It must be made in the form and contain the particulars directed by the commissioners;

(2) It must specify the land out of which the tithes or rent-charge, the subject of the agreement, issue;

(3) It must state the quantity, state of culture, and annual value of the land proposed to be given;

(4) The same consents to and confirmation of the

agreement are necessary as in the case of an agreement for commutation;[1]

(5) The land given must not be leasehold, or of copyhold or customary tenure if subject to any arbitrary fine or heriot, and must be free from incumbrances, except leases at improved rent, and land tax or other usual outgoings.

This agreement having been entered into as described, the commissioners must satisfy themselves of the title to the land proposed to be given in lieu of tithes or rent-charge, that the same[2] are of the description and value set forth in the agreement, and that the agreement itself conforms to the provisions of the statute.

The commissioners, being satisfied on these points, confirm the agreement, which then operates as a conveyance of the land, vesting it in the owner of the tithes or rent-charge upon the same trusts and uses as the tithes or rent-charge for which it is given are vested and held.[3]

After the 1st January following the confirmation of the agreement, the lands of the parish are absolutely discharged from the payment of the tithes or rent-charge for which the land is agreed to be given (sect. 68).

[1] See pp. 28, 29.

[2] The words "the same" probably refer to both the land and the tithes or rent-charge, being followed by the word "are" they cannot refer to the land alone.

[3] There does not seem to be in these sections any limitation of the time when such agreement may be made, however by 2 & 3 Vict. c. 62, s. 20 it is expressly provided that this power shall be exercisable as well after as before the confirmation of the instrument of apportionment.

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2. By sect. 62 of the same Act, and 2 & 3 Vict. c. 62, s. 19, the owner of any land upon which a rent-charge has been apportioned may, at any time prior or subsequent to the confirmation of the instrument of apportionment, agree with any ecclesiastical person, who is the owner of the tithes charged on his lands in right of any spiritual benefice or dignity, for giving land instead of the rent-charge on his lands.

Every such agreement must fulfil all the same conditions as a parochial agreement for giving land,[1] and must be made under the hands and seals of the land and tithe owners. No such tithe owner may take or hold more than twenty acres of land in the same parish under any agreement or agreements,[2] and any amendment made subsequent to such agreement and prior to the confirmation of the apportionment, which alters the charge upon the lands referred to in any such agreement, annuls the agreement.

3. Under the provisions discussed under heads 1 and 2, the landowner, by giving land in lieu of vicarial tithe, would not free his land from rectorial tithe, and conversely, by giving his land in lieu of rectorial tithe he would not free it from vicarial, and so sect. 6 of 5 & 6 Vict. c. 54 provides a means by which he may get rid of both rectorial and vicarial tithe.

Under this section any tithe owner may, subject to the approval of the commissioners, and in the case of

[1] See pp. 68, 69.

[2] Quære if this includes parochial agreements.

spiritual tithes, subject also to the consent of the patron and ordinary, and to the limitation of twenty acres, agree for the assignment to any other owner of tithes issuing out of the same lands of so much of his tithes arising within the same parish (or of the rent-charge agreed or awarded to be paid instead of such tithes) as may be equivalent to the tithes of such other tithe owner issuing out of the same lands (or of the rent-charge agreed or awarded to be paid in lieu thereof), for the purpose of enabling any landowner desirous of giving land instead of tithes to free his lands, or any part of them, from both rectorial and vicarial tithes, or rent-charges in lieu of tithes.

Every such agreement is to be carried into effect by an award, or supplemental award, of the commissioners, made in the same manner as ordinary awards, or supplemental awards.

4. 5 & 6 Vict. c. 54, s. 7 provides for the confirmation by the commissioners of agreements for giving land or money, or both, instead of tithes or glebe or commonable or other rights or easements, made prior to the passing of the principal Act.

5. By sect. 20 of 23 & 24 Vict. c. 93, in every case in which a gross rent-charge is charged upon any land subject to common rights, or held or enjoyed in common during the whole of the year (except where a gross rent-charge has been made payable in respect of the tithes of any gated or stinted pasture, such gates or stints being rated to the relief of the poor), the commissioners are,

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upon the application in writing of the person entitled to the rent-charge, or of any person liable to pay it, or any part of it, to call a meeting of the owners of the land and the persons liable to pay the rent-charge, of which meeting they are to give twenty-one days' notice, and the majority in value of the persons present at this meeting may determine whether the rent-charge shall be commuted for an equivalent part of the land on which it is chargeable, or be redeemed for a sum equal to twenty-five times the amount of the rent-charge.[1]

If no determination is come to at the meeting, then the commissioners have power to commute the rent-charge for land, in which case they must define and set out the land to be given, and vest it in the owner of the rent-charge by an award.

6. In any case where land or money payments, or both, had been, prior to 1847, given instead of tithes or glebe or commonable or other rights or easements by virtue of any Act of Parliament, the provisions of which had not been fully carried out, or by virtue of any arrangement not of legal validity, the commissioners might, under 23 & 24 Vict. c. 93, s. 40, by an award confirm the tithe owner in the possession of the land or money, or both, and might confirm and render valid any such arrangement, awarding a rent-charge in addition, if it should seem fit to them; and subject to such confirmation and award might extinguish the right of the tithe owner to the perception of the tithes, or his

[1] See pp. 85, 86.

title to the glebe, rights or easements, or to the receipt of any rent-charge other than that (if any) awarded by them in addition to the land or money, or both.

Sect. 20 of 2 & 3 Vict. c. 62 provides that any land taken by any ecclesiastical tithe owner under any agreement for giving land instead of tithes or rent-charge, upon confirmation of the agreement, shall vest absolutely in the tithe owner and his successors.

In every such case the commissioners must cause to be inserted in, or endorsed upon, the agreement the amount of the rent-charge instead of which the land is given and the land upon which it was chargeable.

Any person who would have been entitled to recover the land given by the agreement, or any rents and profits issuing out of it, has a right of action for damages against the party giving such land, or his executors or administrators.

Any damages recovered, and all costs and expenses incurred in recovering them, become payable out of the lands freed by the agreement.

All agreements and assurances made for the purpose of giving land to any ecclesiastical tithe owner and his successors are valid if made by any corporation, sole or aggregate, or any trustees or feoffees for charitable purposes (sect. 21), or by churchwardens and overseers, or trustees or feoffees of parish property or of property held by or vested in such trustees or feoffees for parochial or other uses or purposes in the nature of a parochial or public trust (sect. 17 of 3 Vict. c. 15).

CHAPTER VI.

DISCHARGE OF LAND FROM LIABILITY TO TITHES OR TITHE RENT-CHARGE BY MERGER.

Owing to the nature of tithes no merger of them could take place, even though the same person was the owner of an estate in fee simple in the tithes and in the land out of which they issued; but now, by statutory provision, tithes or the rent-charge for which they have been commuted may be merged or extinguished by the following persons:—

1. Any person or persons seised, either alone or together, of an estate in fee simple or tail in possession, or who has the power of acquiring or disposing of the fee simple in possession of any tithes or rent-charge (sect. 71 of the principal Act, and sect. 1 of 1 & 2 Vict. c. 64).
2. Any person possessed of an estate for life in tithes, or rent-charge in lieu thereof, and in the land chargeable therewith, where both tithes or rent-charge and land are settled to the same uses (1 & 2 Vict. c. 64, s. 3).
3. Any person to whom glebe or other land, and the tithes or rent-charge thereof, belong in virtue of his benefice, or of any dignity, office or appointment (2 & 3 Vict. c. 62, s. 6).

4. Any person entitled in equity who, if he were legally entitled, would be empowered to merge (9 & 10 Vict. c. 73, s. 19).

By 1 & 2 Vict. c. 64, s. 4 it is enacted that all provisions as to merger shall extend to copyholds;[1] and by 2 & 3 Vict. c. 62, s. 7 it is provided that in all cases of merger of tithes or rent-charge issuing out of any copyhold land, which is subject to an arbitrary fine, the commissioners may, on the application of the owner of the land, ascertain the annual value of the tithes or rent-charge, and cause to be endorsed on the deed, declaration, or other instrument effecting the merger, a certificate under their hands and seal setting forth such annual value. In every such case the parties entitled to the arbitrary fine must, in any future assessment of it, assess it as if the lands were still subject to the tithes or rent-charge of which the annual value is indorsed. Proof thereof may be given by production of the original deed, declaration or instrument of merger, with the certificate indorsed thereon, or by a duplicate or office copy thereof.

Merger is effected by a deed or declaration under the hand and seal of the person or persons entitled to merge, made in a form approved by the commissioners, and confirmed under their seal, conveying, appointing, or otherwise disposing of the tithes or rent-charge, so that they may be absolutely merged and extinguished in the freehold and inheritance of the lands charged therewith.

[1] By 5 & 6 Vict. c. 54, s. 20 copyhold includes land held under any customary tenure or any other tenure liable to any arbitrary fine.

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This deed or declaration is not subject to stamp duty (1 & 2 Vict. c. 64, s. 2).

Sect. 1 of 1 & 2 Vict. c. 64 provides that all such deeds and declarations shall be valid, though not made in the manner or with the formalities and requisites which would otherwise have been essential; and sect. 19 of 9 & 10 Vict. c. 73 confirms all instruments, purporting to merge tithes or rent-charge, previously made with the consent of the commissioners, subject, however, to any charge, incumbrance or liability.[1]

Upon merger of any tithes or rent-charge the lands in which they are merged become subject to any charge, incumbrance or liability which previously to the merger existed on such tithes or rent-charge, but only to the extent of the value of such tithes or rent-charge.

All such charges, incumbrances, and liabilities have priority over any charge or incumbrance affecting the land at the time of the merger. The lands and the owner thereof become liable to the same remedies for the recovery of any payment and the performance of any duty in respect of such charge, incumbrance or liability, or in respect of any penalty or damages for non-payment or non-performance thereof respectively, as the merged tithes or rent-charge or the owner thereof would have been but for the merger.

By sect. 2 of 2 & 3 Vict. c. 62 any person entitled to merge tithes or rent-charge may, with the consent of

[1] The section covers the case of a merger purported to be effected by a person having no interest whatever in the tithes purported to be merged (*Walker* v. *Bentley*, 9 Hare 629).

the commissioners under their hands and seal, and of the person to whom the land belongs, either by the deed, instrument, or declaration effecting the merger, or by some separate deed, instrument, or declaration, made in a form approved by the commissioners, specially apportion the whole or any part of any charge, incumbrance, or liability affecting the merged tithes or rent-charge upon the lands in which they are merged or any part thereof, or on any other lands belonging to the same person and held under the same title and for the same estate in the same parish, or upon the several closes or portions of such lands, or according to an acreable rate or rates upon lands of different quality. No land, however, may be exclusively charged unless its value is, in the opinion of the commissioners, at least three times the value of the amount of the charge, incumbrance, or liability intended to be charged on it, over and above any other charges and incumbrances which may affect it.

Lastly, sect. 18 of 9 & 10 Vict. c. 73 enables tithes to be merged after the agreement or award of a rent-charge, but before its apportionment; and, in the case of a merger extending only to a portion of the lands which would have been chargeable with the rent-charge, provides for the apportionment of the rent-charge among the other lands to the extent to which they would have been chargeable had there been no merger, and for the payment by the owner of the lands to which the merger extends of such portion of the expenses as the commissioners may under the special circumstances order, instead of his rateable proportion only.

CHAPTER VII.

REDEMPTION OF TITHES OR TITHE RENT-CHARGE.

VARIOUS powers of redemption, and various modes of exercising those powers, are conferred by the statutes.

The mode in which they vary is determined sometimes by the value of the tithe or rent-charge to be redeemed, and sometimes by other considerations; it will, therefore, be convenient to consider them under separate heads.

1. Where the amount of rent-charge agreed or awarded to be paid instead of the tithes of any parish does not exceed 15*l.*, and the rent-charge has not been apportioned.

The provisions for redemption in this case, owing to the fact that the commutation of all tithes throughout England and Wales and the apportionment of the equivalent rent-charge are practically complete, has become obsolete, and does not require to be further considered. Anyone interested can find the provisions in sects. 1 and 2 of 9 & 10 Vict. c. 73, and sect. 31 of 23 & 24 Vict. c. 93.

2. Where the rent-charge has been apportioned, and the whole of the rent-charge or of the separate portion of rent-charge with which the lands of any one owner

are charged, either in respect of all tithes or of any particular kind of tithes payable to separate tithe owners, and which it is desired to redeem, do not exceed 20*s*.

In this case it is provided by sect. 5 of 9 & 10 Vict. c. 73 that the owner of the land, with the consent of the persons entitled to the receipt of the rent-charge (or in the case of an infant, married woman,[1] or lunatic, the consent of the guardian, husband,[1] or committee), may apply to the commissioners to redeem by payment of a sum not less than twenty-four times the amount of the rent-charge or portion of rent-charge sought to be redeemed. The commissioners must thereupon certify under their hands and seal the sum of money in consideration of which such rent-charge may be redeemed (sect. 6).

3. Where land is charged with any rent-charge not exceeding 20*s*.

In this case 41 & 42 Vict. c. 42, s. 3 provides that either the owner of the land or the person entitled to the rent-charge may apply to the commissioners to redeem, and the commissioners may, if they see fit, by an order under their hands and seal direct the rent-charge to be redeemed by payment by the owner of the land, within such time as they may direct, of a sum equal to twenty-five times the amount of the rent-charge.

This case differs from 2, in that the commissioners have an option to grant or refuse leave to redeem, and

[1] But see now the Married Women's Property Act, 1882.

Chap. VII. they are empowered to order redemption upon the application of either the landowner or the person entitled to the rent-charge: whereas in 2 the commissioners apparently have no option, being bound upon a proper application to grant the certificate, but, on the other hand, the consent of both the landowner and the person entitled to the tithes is necessary.

4. Where any land is charged with a rent-charge exceeding 20*s*.

In this case sect. 4 of 41 & 42 Vict. c. 42 provides that the application to the commissioners must be the joint application of the owner of the land and the person entitled to the rent-charge; and in the event of such person being entitled in right of any benefice or cure, the consent of the bishop of the diocese and the patron of the benefice must be obtained.

The consideration money in this case must be not less than twenty-five times the amount of the rent-charge, and, as in 3, the commissioners have the option of ordering the redemption or not.

5. Where by any confirmed instrument of apportionment any rent-charge or portion of rent-charge has been, by reason of error as to boundary or otherwise, charged on lands not within the parish, in respect of the tithes of which the aggregate rent-charge, the apportionment of which has been confirmed, was agreed or awarded to be paid.

In this case, either—

(1) The commissioners may, under sect. 3 of 9 & 10 Vict. c. 73, give notice that such rent-charge may be

redeemed within a certain time by payment by the owners of the lands charged with the residue of the aggregate rent-charge of a sum equal to twenty-four times the amount of the rent-charge, or portion of rent-charge, so erroneously charged. Chap. VII.

Upon being satisfied of the due payment of the consideration money, the commissioners are to certify under their hands and seal that such rent-charge, or portion of rent-charge, has been redeemed; and as respects the remainder of the rent-charge included in it the instrument of apportionment remains valid.

Should the consideration money not be paid, the commissioners must proceed to make a fresh apportionment or to correct the old one[1]; or

(2) The owner or owners of the lands upon which the rent-charge or portion of rent-charge is so erroneously charged, may, under sect. 33 of 23 & 24 Vict. c. 93, apply to the commissioners, who may, if they see fit, without the consent of any owner of land in the parish, or of the person entitled to the receipt of the rent-charge, by an order under their hands and seal, direct such rent-charge, or portion of rent-charge, to be redeemed by the payment by the owners of lands charged with the residue of the aggregate rent-charge within a certain time of a sum equal to twenty-five times the amount of the rent-charge. If any question should arise touching the situation or boundary of the lands alleged to have been erroneously charged, the commis-

[1] See p. 63.

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sioners have the same power of hearing and settling it as they have in the case of making an award.[1]

6. Where lands charged with an apportioned rent-charge are divided for building or other purposes into numerous plots.

This case is provided for by sect. 32 of 23 & 24 Vict. c. 93, and sect. 5 of 41 & 42 Vict. c. 42.[2]

(1) Under the former statute any one owner of the lands may apply to the commissioners, who, if it appears to them that no further apportionment of the rent-charge can conveniently be made, and if they see fit, may, without the consent of any other owner, or of the person entitled to the receipt of the rent-charge, and without limitation as to the amount, by an order under their hands and seal, direct such rent-charge to be redeemed by payment, within a certain time, by the owners of the land chargeable therewith, of a sum equal to twenty-five times the amount of the rent-charge.

(2) Under the later Act the commissioners have the same power upon the application of the owner of the rent-charge, or of the person for the time being entitled to its receipt.

It is submitted that this must be the true construction of the section. It is, however, very commonly understood quite differently, the word "owner" being taken to mean owner of the land, not owner of the rent-charge.

The following reasons seem to show that this construction is impossible:—

[1] See pp. 19, 20.

[2] See the two sections set out in full in the Appendix, p. 118.

(i) The wording of the section being so far exactly identical with that of sect. 32 of 23 & 24 Vict. c. 93, and the use of the word "owners" in the latter part of the section under consideration, show that the two sections apply to the same state of facts, and that both contemplate the divided lands being held by more than one owner, otherwise we should find "owner or owners," instead of "owners" simply. Thus, the opinion of those who consider that the two sections apply to a different state of things, the first where the divided lands are owned by more than one owner, and the second where the lands, though divided, are still owned by one owner, appears to be untenable;

(ii) Seeing, then, that the section contemplates, at all events, the possibility of there being more than one owner of the divided lands, had it been intended to enable a landowner to apply, the section would have read "any one owner of the said lands," as in the previous section; but this is not so, and if it were it would make the provision a mere repetition of that in the previous section, which could never have been intended. The words used are "*the* owner," *i. e.*, the definite owner of some definite thing, which can only be the rent-charge;

(iii) If "the owner" means the owner of the land, then no power to apply is in any case given

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to the owner of the rent-charge, as distinguished from the person entitled to its receipt for the time being, where the owner is not at the time himself so entitled. The word "owner" of tithe has no doubt been defined to include the person entitled to the rents or profits for the time being;[1] and it might, therefore, be argued that the word "owner," if it meant owner of rent-charge, would be enough to include both, and that the addition of the words "or person for the time being entitled, &c.," would be unnecessary; but that would hardly be so where it is intended, as it seems to be here, to distinguish between them, and enable *either* to apply;

(iv) Throughout the other provisions relating to redemption where the owner of the lands is intended it is expressly so stated; and this is so in sects. 3 and 4 of the same statute.

7. Where land charged with rent-charge is taken for any of the following purposes:—

(1) The building of any church, chapel, or other place of public worship;

(2) The making of any cemetery, or other place of burial;

(3) The erection of any school under the Elementary Education Act (33 & 34 Vict. c. 75);

[1] See p. 15.

(4) The erection of any town hall, court of assize, gaol, lunatic asylum, hospital, or any other building used for public purposes, or in the carrying out of any improvements under the Artizans' Dwellings Act (38 & 39 Vict. c. 36).

(5) The formation of any sewage farm under the provisions of the Sanitary Acts, or the construction of any sewer, or sewage works, or any gas or water works; or

(6) The enlarging and improving of the premises or buildings occupied or used for any of the above-mentioned purposes.

Sect. 1 of 41 & 42 Vict. c. 42 provides that the person intending to carry out any of the above-mentioned works must, as soon as he becomes possessed of the land, and before it is applied to any of the above purposes, apply to the commissioners to order the redemption of the rent-charge in consideration of a sum equal to twenty-five times its amount. This sum, with the expenses incident to the redemption, must be paid to the commissioners within a time fixed by their order.

If the land is taken by a company the application may be signed by its secretary; if by any corporation, school, or other board, by its clerk; and in any other case by such person or persons as the commissioners may require. (Sect. 2.)

8. Where a gross rent-charge is charged upon any land subject to common rights, or held or enjoyed in common during the whole year (except where the rent-

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charge has been made payable in respect of the tithes of any gated or stinted pasture,[1] where such gates or stints[1] are rated to the relief of the poor).

In this case the commissioners must, under sect. 20 of 23 & 24 Vict. c. 93, upon the application in writing of any person liable to pay the rent-charge, or any portion thereof, or of the person entitled to the rent-charge, call a meeting of the owners of the land and persons liable to pay the rent-charge, of which meeting they must give twenty-one days' notice. The majority in value of the persons attending this meeting may determine whether the rent-charge shall be commuted or redeemed by payment, within a time to be limited by the commissioners, of a sum equal to twenty-five times its amount, and may also determine whether the redemption money shall be raised by a rate on the persons liable to such rent-charge, or by sale of a portion of the land. In the latter case the commissioners may define and set out such part of the land as may be sufficient in value to meet the redemption money and the expenses of sale, and may proceed to sell and dispose of the same by public auction or private contract at their discretion. Upon every such sale the commissioners must sign and deliver to each purchaser a receipt for his purchase-money, which receipt is a sufficient discharge, and must convey the fee simple of the lands to the purchasers under their hands and seal, to such uses and in such manner as the purchasers direct. A form of convey-

[1] See note to p. 47.

ance is given in a schedule to the Act, which is not, however, compulsory.

9. Where lands have been improperly included or charged with rent-charge in any confirmed instrument of apportionment.

In this case the commissioners have power, under sect. 3 of 10 & 11 Vict. c. 104, to sanction the redemption of the rent-charge by the persons capable of redeeming.

Whenever the commissioners intend to order compulsory redemption of any rent-charge, they must cause notice to be given of their intention, specifying a time, not less than twenty-one days after the date of the notice, within which objections in writing to the proposed order may be signified to them.

In case of any objection being made, the commissioners or an assistant commissioner must take it into consideration before finally making the order.

The propriety of the redemption and the amount for which any tithe rent-charge may be redeemed having been ascertained in one of the foregoing ways, it now becomes necessary to consider—1. By whom the money for the redemption, with the attendant expenses, is payable; 2. How it can be raised in certain cases by the person liable to pay it; 3. How it can be recovered in default of payment; and 4. To whom the redemption money is payable.

1. By whom the money is payable.

There seems to be no express provision in the Acts as to this, but it may be impliedly gathered from sect. 39 of 23 & 24 Vict. c. 93 that it is payable by the owners

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of the land affected, in such proportions as the commissioners may direct.

For the purpose of assessing the various amounts payable by different landowners this section empowers the commissioners to employ valuers, land surveyors, or other persons, in their discretion, and gives to the commissioners and persons so appointed by them all the powers vested in them with reference to an award or apportionment.[1]

2. How the money can in certain cases be raised by the person liable to pay it.

(1) It is provided by sect. 11 of 9 & 10 Vict. c. 73 that any owner of an estate in land less than a fee simple or fee tail in possession, or which may be settled upon any uses or trusts, may, with the consent of the commissioners, or[2] in such manner as they shall direct, charge upon such lands so much of the consideration money and other incidental expenses as represents the rent-charge upon such lands, with interest at four per cent. The charge is to be so calculated that it shall be lessened one-twentieth part at least every year.

(2) By sect. 21, sub-sect. (i) of the Settled Land Act, 1882 (45 & 46 Vict. c. 38), capital money arising under that Act may be applied in the redemption of rent-charge in lieu of tithe charged upon the settled land.

[1] See pp. 18—21, 34.

[2] The word "or" must, undoubtedly, be an error in the drafting or printing of the statute. If the commissioners do not consent, how can they be in a position to state the manner in which the charge is to be made? It should no doubt read "and."

3. How the money can be recovered in default of payment within the time fixed.

It may be recovered in the same way as the expenses of an award or apportionment[1] (sect. 39 of 23 & 24 Vict. c. 93), and the commissioners may, for the purposes of such recovery, and to collect the money, employ valuers, land surveyors, and other persons; and they themselves and the persons so appointed by them have the same powers as in the case of assessment;[2] and all expenses so incurred may be recovered as part of the original expenses.

Before proceeding under this section to collect any redemption-money or expenses, the commissioners must cause a schedule to be prepared showing (1) the total amount of the redemption-money and expenses, and (2) the share to be borne by each person interested. This schedule is to be deposited for inspection in the same way as a draft instrument of apportionment.[3] Notice of the deposit is to be given by the commissioners, which notice is also to specify a time, not less than twenty-one days after the date of the notice, within which objections in writing to the proposed apportionment of redemption money and expenses may be signified to the commissioners. Should any such objections be made, the commissioners are to take them into consideration before collecting the redemption money and expenses. If there are no objections, or, if there are, when they have determined them, the commissioners can proceed to collect the

[1] See p. 51. [2] See last page.

[3] See p. 36.

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redemption money and expenses in the same way as in the case of an award or apportionment.[1]

4. To whom the redemption money is to be paid.

(1) Where the person entitled to the rent-charge is entitled to it in fee simple in possession, or is able to dispose of the fee simple in possession, and is not

(i) a spiritual person entitled in respect of his benefice or cure, or

(ii) a corporation unable to alienate the rent-charge,

the payment or tender should be made to such person, or in the case of a corporation to its proper officer. (9 & 10 Vict. c. 73, s. 7.)

(2) Where the person entitled to the rent-charge is entitled in respect of any benefice or cure, the payment should be made to the Governors of Queen Anne's Bounty. The receipt of the treasurer is a sufficient discharge, and the person paying need not trouble to see to the application of the money. (9 & 10 Vict. c. 73, s. 8.)

(3) Where the person entitled is only entitled for a limited estate or interest, or is under any disability, or is a corporation unable to make an absolute sale, the money is to be paid under sect. 9 of 9 & 10 Vict. c. 73, and the Supreme Court of Judicature (Funds, &c.) Act, 1883, to the Paymaster-General of the Supreme Court of Judicature, with the following exceptions, viz. :—

(i) in any of the above cases, where the consideration money payable for the redemption of all the rent-charge does not exceed 20*l.*, it may, at

[1] See p. 51.

the option of the commissioners, be paid to the person for the time being entitled thereto, or, in case of disability, for the use of such person to his guardian, committee or trustee;

(ii) in the case of a person entitled for a limited interest only, it may, at his option, be paid to the trustees acting under the will, conveyance, or settlement under which he is entitled, or if there are no such trustees, to trustees to be nominated under the hands and seal of the commissioners; and

(iii) in the case of a corporation unable to make an absolute sale being entitled, where the money to be paid for redemption does not exceed 200*l.*, it may be paid to trustees to be nominated under the hands and seal of the commissioners (23 & 24 Vict. c. 93, s. 37).

The money so paid to the Paymaster-General, or to the trustees, may be applied in any of the following ways:—

(i) the purchase or redemption of the land tax;

(ii) the discharge of any debt or incumbrance affecting the rent-charge, or any other hereditaments settled therewith to the same or like uses, trusts, or purposes;

(iii) the purchase of other lands to be conveyed, limited, and settled upon the like uses, trusts, and purposes;

(iv) payment thereof to any person becoming absolutely entitled.

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Until its application in one of the above ways, it was provided by sect. 9 of 9 & 10 Vict. c. 73 that the money should be invested in consols, or goverment or real securities, and the income paid to the person entitled.[1]

(4) Where the person absolutely entitled refuses to accept the redemption money, or, if the rent-charge is subject to incumbrances, and the commissioners consider that the incumbrancers should be protected, the redemption money is to be dealt with as in the case of an owner of a limited estate (23 & 24 Vict c. 93, s. 36).[2]

The redemption money having been duly paid or tendered, the commissioners may certify that the rent-charge has been redeemed.

The certificate is to be under the hands and seal of the commissioners, and must show the amount of the consideration money, and by whom it has been paid, and to what person, or in what manner. Copies of every such certificate, signed and sealed by the commissioners, are to be deposited in the same way, and copies of, and extracts from, any copy are to be furnished in the same manner as in the case of confirmed instruments of apportionment.[3]

[1] By sect. 10 of 23 & 24 Vict. c. 38 trustees empowered to invest on (*inter alia*) government securities may invest on the same securities, &c., as are authorized for cash under the control of the Court.

It seems that moneys paid to the Paymaster-General under this Act are cash under the control of the Court (see *Ex parte St. John's College, Oxford*, 22 Ch. D. 93).

A list of the securities, &c., at present authorized for the investment of cash under the control of the Court will be found in R. S. C. Ord. XXII. r. 17, a new rule of November, 1888.

[2] See pp. 90, 91.

[3] See pp. 37, 38.

Every recital or statement in any such certificate, or in any sealed copy thereof, is made evidence of the matters recited therein (9 & 10 Vict. c. 73, s. 12).

By sect. 6 of 9 & 10 Vict. c. 73 it is provided that, if in any case consideration money is paid to the wrong person, the land which was charged with the rent-charge shall be charged with the payment of the consideration money to the person rightly entitled, as if it were unpaid purchase-money; and the owner of the land is given the same remedies against the person to whom the consideration money has been wrongfully paid as a purchaser would have.

The statute 48 & 49 Vict. c. 32 extends to the case of any corn-rent, rent-charge, or money payment, payable out of or charged on any land in lieu of tithes by an Act of Parliament, all the above powers and provisions for redemption, with the following additions and exceptions:—

1. Every application to redeem is to be accompanied with a certified copy or extract from the Act, and from the award made in pursuance thereof, signed by the person or persons having the custody of the Act and award (if any), showing the amount of the corn-rent, rent-charge, or money payment proposed to be redeemed.

2. It must also be accompanied with such evidence or proof of the payment of the corn-rent, rent-charge, or money payment, and such particulars of the land liable thereto as the commissioners think fit.

3. If the corn-rent, rent-charge, or money payment has been varied by any order of justices in quarter

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sessions, a certified copy of the last of such orders, signed by the person or persons having the custody of the order, or some other satisfactory evidence of the variation must also accompany the application. In any case of variation by order of justices, the redemption money is to be calculated on the varied amount.

4. Copies of the certificates of redemption are to be sealed by the commissioners, and deposited with such persons as the commissioners may in each case determine.

CHAPTER VIII.

REMEDIES OF THE TITHE OWNER.

In considering this subject a fact should be remembered which is very often lost sight of, *viz.*, that tithes were a charge upon the land, or rather upon its produce; if there was no produce there could be no tithes. Though the Commutation Acts have to a certain extent altered this, and have, as we have seen, substituted for the tithe of the actual produce a sum certain, varying only from year to year with the price of corn, yet this sum was originally calculated on the actual produce of the land in respect of which it is payable, and was a charge upon the land, not upon any person as owner thereof. At the present time there is a great outcry as to the so-called "anomalous" remedies given to the tithe-owner, and a desire, in certain quarters, to substitute for them a right to recover tithe rent-charge from the owner of the land as a simple contract debt, *i.e.*, to substitute a remedy against the person for a remedy against the land. A true appreciation of the nature of tithe rent-charge, as above explained, will show that this is nothing more nor less than a confiscation of the property of the landlord, unless some equivalent concession, *e.g.*, a reduction of so much per cent. in the amount of the rent-charge, is made to him. An example will make this plain:—A., living and owning land in parish B., also owns a farm in parish C., in respect of which a rent-charge of

Ch. VIII. 10*l.* is payable. Owing to bad times this farm will not pay to cultivate, and he has it on his hands, unlet and uncultivated. There being no produce, under the old law, of course, there would be no tithe payable; under the present law, the rent-charge of 10*l.*, or the sum representing it according to corn averages, would be payable; but this would not hurt A., as the remedy by distress would be ineffectual, there being nothing on the land on which to distrain, and it would *ex hypothesi* not pay the tithe owner to take possession of the land and cultivate or let it. How different would be the position under the proposed new legislation! A. would then not only be saddled with his unprofitable farm, but would further have to pay the 10*l.* (or sum representing the same) in respect of the imaginary produce thereof, or would be liable to an action as for an ordinary debt, which might be recovered by distress on his land in parish B. Practically, a clear confiscation of 10*l.* from him for the benefit of the tithe owner: a result no doubt very gratifying to tithe owners generally, and not entirely out of character with other recent legislation.

This is not, however, intended as a political treatise, and we will, therefore, at once proceed to consider the present remedies of the tithe owner. These are:—

1. Distress.

A tithe owner levying a distress must observe the following conditions:—

(1) The rent-charge must be twenty-one days in arrear (sect. 81 of the principal Act).

(2) Ten days' notice in writing must have been given to, or left at the usual or last known residence, or have been sent by post in a registered letter to the office or usual place of abode of the tenant in possession of the lands in respect of which the rent-charge is in arrear (sect. 81 of the principal Act and sect. 30 of 23 & 24 Vict. c. 93), or if no person can be found on the lands, then the notice may be posted in some conspicuous place on the land (sect. 17 of 5 & 6 Vict. c. 54).

Every person entitled to distrain may charge 2*s.* 6*d.* for each notice issued by him in accordance with the provisions of the Acts, and may add the amount to and recover it as part of the arrears of rentcharge (sect. 29 of 23 & 24 Vict. c. 93).

(3) No distress can be levied for more than two years' arrears (sect. 81 of the principal Act).

(4) The distress can be taken—

(i) Upon the lands liable to the payment (sect. 81);

or

(ii) On any part of the lands so liable[1] (*ibid.*); or

[1] Here the distinction between a rent-charge in gross and one apportioned on separate closes of land becomes very important. Suppose A owns a farm, all in one parish, containing six closes, B, C, D, E, F, G, and sells close B to H; if the rent-charge is apportioned in gross, *e.g.*, £10 on the whole farm, the tithe owner may distrain for any arrear of any part of the tithe rent-charge on any lands in the parish owned and occupied by A, and also on any lands in the parish owned and occupied by H; but if the rent-charge is apportioned, *e.g.*, £2 on B, £1 on C, £1 on D, and so on, then the lands of A cannot be distrained upon for arrears of rent-charge on B, nor the lands of H in respect of the rent-charges on C, D, E, F, or G.

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(iii) On any land in the same parish occupied by the same occupier, if he is also the owner or holds the lands as tenant under the same landlord under whom he holds the lands liable to the rent-charge,[1] with this exception, that no land is liable to be distrained on or entered upon to satisfy any rent-charge if the land upon which it is charged has been washed away by the sea or otherwise destroyed by any natural calamity (sect. 85 of the principal Act); or

(iv) In the case of Quakers, not only on the premises, but anywhere else (sect. 84 of the principal Act); or

(v) In the case of railway companies, on any property of the company, wherever situate (sect. 22 of 7 & 8 Vict. c. 85); or

(vi) On lands allotted on inclosure of commons in respect of rights of common appendant or appurtenant to any tenements or hereditaments, for arrears of rent-charge charged on such tenements and hereditaments (sect. 14 of 2 & 3 Vict. c. 62).

The process of distraint itself being similar to that in the case of landlord and tenant, will not be further gone into here.

In the case of Quakers, however, the distress may be sold at once, without being previously impounded or kept.

[1] See note on last page.

It seems, also, that arrears of rent-charge payable by an owner of cattle or stock under 2 & 3 Vict. c. 62, s. 13 may be distrained for in the usual way as rent in arrear, and that the conditions noted above need not be observed.

Sect. 19 of 5 & 6 Vict. c. 54 provides that no irregularity or unlawful act done by the person distraining, or his agent, in the conduct, sale, or disposition of the distress, shall make the distress itself unlawful, provided the amount distrained for is justly due, nor shall the party making the distress be deemed in consequence a trespasser *ab initio*, but the party aggrieved may recover any special damage he has suffered, provided he gives one calendar month's[1] notice in writing of his intention to do so.

Any one of the following pleas would be a sufficient defence to such an action :—

(1) That one calendar month's notice in writing had not been given to the defendant;

(2) That tender of sufficient amends was made before action brought;

(3) That plaintiff has suffered no special damage;

(4) That a sufficient sum of money has since action brought been paid into Court to cover the damage suffered and costs.

If a tithe owner distrains, and afterwards obtains judgment in an action of replevin, he is not entitled to double costs under sect. 22 of 11 Geo. 2, c. 19, nor to

[1] Originally ten days, extended by 5 & 6 Vict. c. 97, s. 4. As to what is a calendar month see *Freeman* v. *Read*, 32 L. J. (M. C.) 226.

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the full and reasonable indemnity substituted therefor by sect. 2 of 5 & 6 Vict. c. 97.[1]

2. Taking possession of the land.

To enable the tithe owner to do this—

(1) The rent-charge must be forty days in arrear;

(2) There must not be a sufficient distress[2] on the premises, or, in the case of Quakers, anywhere else;

(3) He must apply in Chambers[3] on affidavit, setting out the facts, for a writ to be issued to the sheriff of the county in which the lands are situated, requiring him to summon a jury to assess the arrears of rent-charge unpaid, and to return the inquisition on a day named in the writ;

(4) A copy of the writ, and notice of the time and place of executing it, must be given to the owner of the land, or left at his last-known place of abode, or with his known agent, ten days before the execution of it; or they may be served on any person occupying or residing on the land; or if no person is to be found there, by fixing them in some conspicuous place on the land (5 & 6 Vict. c. 54, s. 17);

[1] See *Newnham* v. *Bever*, 8 C. B. 560.

[2] In estimating this regard must be had to the value of growing crops, though not capable of realisation within the forty days (*Ex parte Arnison*, L. R. 8 Ex. 56).

It is not necessary that the owner of the rent-charge should have ineffectually attempted to distrain at the end of all or any of the preceding half years, and he is entitled to recover two years' arrears by distress, or by taking possession of the land in default, though there may have been a sufficient distress on the land at the end of each half year except the last (*In the matter of Camberwell Rent-charge*, 4 Q. B. 151).

[3] The application may be made *ex parte* (*In re Hammersmith Rent-charge*, 4 Exch. 87).

(5) The sheriff must execute the writ by summoning the jury to assess the arrears. The tithe owner will have to prove the amount due to the satisfaction of the jury;

(6) The costs of the inquisition by the jury must be taxed by the proper officer;

(7) The return of the inquisition must be made by the sheriff, either during the sittings or vacation;

The owner of the rent-charge may then, if the return is in his favour, sue out a writ of possession commanding the sheriff to put him in possession of the lands until the arrears of rent-charge found due by the inquisition, and the costs previously taxed, and also the costs of the writ of possession and of its execution, and the cost of cultivating and keeping possession of the lands, shall be fully satisfied.

By this remedy only two years' arrears, exclusive of the time during which the owner of the rent-charge is in possession, can be recovered.

The tithe owner while in possession of the land may cultivate it himself, or may let it, or any part of it, for any period not exceeding one year at a reasonable rent (5 & 6 Vict. c. 54, s. 12). He must keep an account of the rents and produce of the land, and receipts and payments; and it is advisable that he should keep all vouchers, as under sect. 83 of the principal Act he may at any time be called upon to render an account in Chambers. When all the arrears, costs, and expenses, as above set out, have been satisfied, a writ of supersedeas is issued, and the possession restored to the owner or occupier of the land, subject, however, to any

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tenancy created under the provisions of sect. 12 of 5 & 6 Vict. c. 54.

The Court or a judge,[1] under sect. 83 of the principal Act, can also at any time give such summary relief to the parties as may seem fit.

Where any land charged under the instrument of apportionment with one amount of rent-charge belongs to two or more owners in several portions, if the owner of one portion, or his tenant, has paid what he considers to be more than his just proportion of the rent-charge, he may make a demand in writing upon any other landowner, or his tenant, whom he considers liable to contribute. This demand may be served upon any person occupying or residing on the land chargeable with such contribution, or, if no person can be found on it, then by affixing it in some conspicuous place on the land. If the landowner or his tenant, after demand, refuses or neglects to make contribution of his share, the complainant may apply to a magistrate in whose jurisdiction the land is situated, who may then summon the owner or tenant so refusing or neglecting before two or more magistrates, *i. e.*, petty sessions. The summons may be served in the same way as the demand. The magistrates, upon proof of the demand and service of the summons, having examined into the complaint,[2] may determine the amount, if any, to be contributed,

[1] *I.e.*, a judge in Chambers, *Salm Kyrburg* v. *Posnanski*, 13 Q. B. D. 218, and *Amstell* v. *Lesser*, 16 *id.* 187; and by O. LIV. r. 12, a Master in the Queen's Bench Division may, with certain exceptions, transact all business which may be transacted by a judge in Chambers.

[2] As to what is a sufficient examination and determination by justices, see *Reg.* v. *Williams*, 21 L. J. (M. C.) 150.

and, by order under their hands and seals, direct payment by the person liable, with the costs and charges of the proceedings. Payment of the amount may then be enforced by the complainant in the same way as rent-charge in arrear[1] (5 & 6 Vict. c. 54, ss. 16 and 17). Again, any owner or occupier paying, after notice of the tithe owner's intention to distrain, rent-charge which became due during the previous tenancy, from the tenant by virtue of the terms of his holding, may recover the amount from the previous tenant as a simple contract debt (14 & 15 Vict. c. 25, s. 4).

[1] *I. e.*, by distress on taking possession of the land.

CHAPTER IX.

EXTRAORDINARY TITHE RENT-CHARGE.

This rent-charge, which has been the subject of so much recent abuse, and so many disturbances, was in its inception perfectly equitable and reasonable, and, as will be seen, in many instances it owes its existence entirely to the action of the owner of the land charged.[1] It can hardly be disputed that upon the commutation of the tithe of produce into a rent-charge issuing out of the land, it was only just that land bearing a valuable crop, the tithe of which would be of greater value than that of ordinary produce, should be liable to a higher rent-charge than land under an ordinary crop. On the question whether it was desirable that any check should be imposed on the cultivation of produce of this kind on land previously cultivated in another way no opinion is expressed; it is only sought to show that the existence of such a charge is amply justified by the nature of tithes at the time of its first creation.

The provisions in the Acts bearing upon this subject are somewhat confused, and, with the exception of those relating to redemption, have now little practical im-

[1] See next page, and note [1] thereto.

portance; it may, however, be convenient shortly to set them out in a collected form.

The extraordinary charge was imposed upon lands cultivated in the following ways, viz.: as—

1. Hop-grounds; 2. Market gardens; 3. Orchards; 4. Fruit plantations; and 5. Mixed plantations of hops and fruits.

It will be convenient to consider each of these in turn, taking one (*e. g.* hops) first, and considering all the provisions affecting it, and then the others in turn, pointing out in what way the provisions affecting them agree with and differ from those affecting the first.

1. Hop-grounds.

The extraordinary charge was created in three ways:—

(1) Where upon the commutation of tithes any land was cultivated as hop-ground, sect. 40 of the principal Act, sects. 32 and 33 of 2 & 3 Vict. c. 62, and sect. 18 of 3 Vict. c. 15 provided that, upon application being made by the owner of the hop-ground,[1] the tithes should be separately valued according to the average rate of composition for the tithes of hops for seven years preceding Christmas 1835, within a district to be in each case assigned by the commissioners, or an assistant commissioner, or by a parochial agreement.[2] This

[1] Apparently there was no power to fix any extraordinary charge upon lands which were cultivated as hop grounds at the time of the commutation, except on the application of the owner of the land so cultivated.

[2] Apparently it could only be assigned by parochial agreement in the case of hop grounds (sect. 33 of 2 & 3 Vict. c. 62).

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district might be the parish or lands in respect of which the notice requiring the tithes to be separately valued had been given, or any part or parts of such parish or lands.

The value of the tithes was to be estimated as chargeable to all parliamentary, parochial, county, and other rates, charges, and assessments to which the tithes might be liable, and this value, when arrived at, either by assessment by the commissioners or by agreement, was to be added to the value of the other tithes of the parish.

For the purpose of ascertaining the extent of the land cultivated as hop grounds or market gardens, the person to whom any extraordinary charge upon the land is or would be payable, his agents and servants may enter at all reasonable times upon the land, and make an admeasurement and plan of it, without molestation (sect. 43 of 23 & 24 Vict. c. 93).

The amount charged by the apportionment[1] upon any hop grounds in any district is distinguished into two parts, called the ordinary and extraordinary charge, the extraordinary charge being a rate per imperial acre, and the award of the commissioners or parochial agreement might declare the amount of extraordinary charge per acre with which all lands chargeable in the future with extraordinary charge within that district should be chargeable.

[1] By sect. 19 of 3 Vict. c. 15 the amount of extraordinary rent-charge to be charged on the lands of each individual owner need not be distinguished, so long as the acreable amount of extraordinary charge for all the lands in the district is inserted in the apportionment.

(2) In the case of any land situated within a district where an extraordinary charge had been settled, and not cultivated as hop ground at the time of the commutation, but subsequently becoming so, an additional rent-charge per acre, equal to the extraordinary charge per acre on hop grounds in the district, became chargeable after the first year of such cultivation, but only half such charge was payable during the second year. Upon the change in cultivation the land apparently became *ipso facto* liable to this extra charge without any application to the commissioners.

(3) In the case of any land not situated within a district where an extraordinary charge had been settled, and not cultivated as hop ground at the time of the commutation, but subsequently becoming so, the commissioners charged the lands with an additional or extraordinary charge only on the application of some person interested. In this case sect. 42 of 23 & 24 Vict. c. 93 gave the commissioners power to declare the lands in the parish in which the newly cultivated hop grounds were situated a district within which the extraordinary charge then fixed should be thereafter payable.[1]

In this case, as in the last, no rent-charge was payable in the first year, and only half in the second.

2. Market Gardens.

The word "gardens," which occurs alone in one or two places, without the qualifying word "market," is

[1] This power was exerciseable by the commissioners, even though no district had been assigned in the parish at the time of the commutation (*Russell* v. *Tithe Commissioners*, L. R. 6 C. P. 596).

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evidently intended only to extend to market gardens, and not to gardens cultivated for mere pleasure. This is obvious from the fact that in sect. 40 of the principal Act the word "gardens" occurs alone; whereas, in sect. 42, evidently speaking of the same thing, we find the words "market gardens." The two expressions "gardens" and "market gardens" in the Acts may, therefore, be taken as equally meaning only market gardens.

All that has been said as to the creation of the extraordinary charge upon hop grounds, except where expressly confined to hop grounds, applies equally in the case of market gardens, the words "market gardens" being read for "hop grounds," and "garden produce" for "hops."

It was, however, provided by sect. 1 of 36 & 37 Vict. c. 42 that after the passing of that Act no extraordinary charge should be created on any land newly cultivated as a market garden, except in a parish in which an extraordinary charge for market gardens was distinguished at the time of the commutation.

3. Orchards, and 4. Fruit Plantations.

The provisions as to the creation of the extraordinary charge upon these being in a great measure the same and intermixed, it will be convenient to treat them together.

(1) The extraordinary charge upon orchards, but not upon fruit plantations, could be created in the same way, as that upon hop grounds considered under (1),[1]

[1] See pp. 105, 106.

substituting the word "orchards" for "hop grounds," and "produce" for "hops."

(2) Sect. 26 of 2 & 3 Vict. c. 62 provided that where any lands in a parish, the tithes of which were being commuted, were cultivated as orchards or fruit plantations, upon notice in writing given by any owners having an interest in such lands equal to not less than two-thirds of the whole of such lands in the parish, the tithes of such lands should be distinguished into ordinary and extraordinary fruit-charge, as in the case of hop-grounds.

(3) Sect. 27 of the same statute provides for lands becoming newly cultivated after the commutation as orchards or fruit plantations within a parish in which there is already an extraordinary fruit-charge, becoming similarly chargeable, with certain qualifications as to the time when the charge was to commence in the case of various fruits.

5. Mixed plantations of hops and fruits.

The following provisions apply to mixed plantations:—

(1) Sect. 29 of 2 & 3 Vict. c. 62 provided that where lands within the limits of a parish in which an extraordinary fruit-charge had been distinguished were planted with fruit and hops, they should be liable only to the extraordinary fruit-charge or the extraordinary hop-charge, whichever should be highest.

(2) In the case of such plantations, which at the time of commutation were liable to both rectorial and vicarial tithes payable to different persons, sect. 30 of 2 & 3 Vict. c. 62 provided that the apportionment was to set out the

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same, distinguishing the amount of ordinary and extraordinary charge payable to each tithe owner, and dividing the whole acreable extraordinary charge between the tithe owners according to the quantity of land producing rectorial and vicarial tithe respectively.

(3) In the case of such plantations situate in any parish or district in which an extraordinary fruit charge had been declared, the rectorial and vicarial tithes of which would, had there been no commutation, have been payable to different owners, sect. 31 of the same Act provided that the extraordinary charge should be divided between such owners in proportion to the extent of land occupied by the produce, which would have paid tithe to each of them respectively. The provisions as to total or partial exemption from extraordinary charge during the early years of the changed cultivation applicable to each class of produce apply equally to the mixed plantations.

Such was the law as to the creation of extraordinary rent-charge down to 1886, in which year it was provided by 49 & 50 Vict. c. 54, s. 1 that after the passing of that Act no extraordinary charge should be levied upon any hop ground, orchard, fruit plantation, or market garden thereafter newly cultivated as such.

This Act further provided that the commissioners should, as soon as possible, ascertain in every parish the capital value of the extraordinary charge on each farm or parcel of land in respect of which an extraordinary charge might then be payable. The rules by which the commissioners are to be guided in doing this are given in sect. 3 of the Act.

This value, when ascertained, is to be certified by the commissioners under their seal as the capital value of the charge.

Every such certificate is to be filed in the office of the commissioners, and any person requiring a copy thereof is to receive one on payment of the proper fee. This copy is, by sect. 11, sub-sects. (1) and (2) of the Act, made sufficient evidence of the certificate.

As soon as the commissioners have certified the capital value of any charge, the land affected thereby becomes charged with the payment of an annual rent-charge equal to 4 per cent. on the capital value certified instead of the extraordinary charge.

The following are special incidents of this annual rent-charge:—

1. It is payable half-yearly on the same days as the extraordinary rent-charge for which it is substituted (sect. 4, sub-s. 3).

2. It is payable to the person to whom the extraordinary rent-charge would have been payable (sect. 4, sub-s. 4).

3. It has priority over all existing and future estates, interests, and incumbrances (sect. 4, sub-s. 3).

4. Any unpaid instalment of it may be recovered either—

(1) In the same way as arrears of rent-charge in lieu of ordinary tithe;[1] or

(2) By action in the High Court or County Court, according to its amount; or

[1] *I. e.*, by distress or taking possession of the land, see pp. 96—102.

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(3) By entry upon and perception of the rents and profits of the land subject to the charge (sect. 4, sub-s. 5).

5. It is not liable to any parochial, county, or other rate, charge, or assessment (sect. 4, sub-s. 5).

6. As between landlord and tenant it is payable by the landlord, notwithstanding any agreement to the contrary between them. Any tenant who, before the Act, had contracted to pay the extraordinary charge upon the land in his occupation or any part of it must, during the continuance of his tenancy, pay the equivalent amount of rent-charge to his landlord. In the case of a tenancy at will, or from year to year, the tenancy is deemed to determine at the time when it would if notice to determine it were given at the date of the passing of the Act.

The Act gives in sect. 14 the following definitions:—

1. "Landowner" means the person for the time being receiving the rack rent of land, whether on his own account or as trustee, or who would so receive it if the land were let at a rack rent.
2. "Tithe payer" means the person for the time being paying an extraordinary charge under the Tithe Commutation Acts.
3. "Titheowner" means the person for the time being receiving an extraordinary charge under the Tithe Commutation Acts, whether on his own account or as trustee, and any person receiving a rent-charge substituted under the Act for an extraordinary charge.

4. "Person" includes a body of persons, corporate or incorporate.

For the purpose of carrying the Act into effect, the commissioners may require the overseers of any parish to supply any information they may consider necessary as to the extraordinary tithe in the parish (sect. 8); and they have all the powers possessed by them in relation to any award or apportionment.[1]

All expenses incurred by the commissioners in carrying out the provisions of the Act are to be paid by the landowners in rateable proportion to the sum certified as the capital value on their respective lands, and may be recovered from them in the same way as the expenses of an apportionment.[2]

Power is given by sect. 12 of the Act to the Governors of Queen Anne's Bounty, in any case where they consider the income of any benefice on which they have a mortgage is diminished by the operation of the Act, to modify such mortgage as they may consider just and reasonable; and sect. 13 empowers the Ecclesiastical Commissioners, where fixed charges have been made on the income of benefices in receipt of extraordinary tithes in favour of other benefices, or of district churches or chapels in parishes, the incumbents of which are in receipt of extraordinary tithes, to make such alterations in the charges as they may consider equitable, having regard to the altered state of things created by the Act.

[1] See pp. 18—21, 34.

[2] See p. 51.

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The extraordinary charge having been created as above indicated, land can be freed from it in any one of the following ways:—

1. By ceasing to be cultivated as hop grounds, market gardens, orchards, or fruit plantations.

2. By exoneration of the land from the charge.

3. By redemption of the charge.

1. If hop grounds, market gardens, orchards, or fruit plantations, at any time cease to be cultivated as such, then the extraordinary charge upon such lands in respect of such cultivation ceases from the 31st of December next following, and the lands are only charged with the ordinary charge, as other lands (sect. 42 of the principal Act, and sect. 28 of 2 & 3 Vict. c. 62).

This, apparently, can only apply in the case of an extraordinary charge of which the capital value has not been certified under the Act of 1886. One of the facts to be taken into consideration by the commissioners in fixing the capital value is the power of the cultivator to cease cultivating in the peculiar way which renders the land chargeable with the extraordinary charge. If this power was intended still to continue with the like result after the certifying of the capital charge, then there would be no occasion to take it into account in fixing that charge.

2. Sect. 4 (sub-sect. 2) of 49 & 50 Vict. c. 54 enables the commissioners, upon the application of any person interested in land charged with a rent-charge under that Act, to exonerate by order under their seal the land in question, or any part of it, from the charge, substi-

tuting, if necessary, other land held under the same title and subject to the same limitations. This substitution is not necessary in every case, and a portion of the land chargeable may be exonerated, leaving only the remaining portion chargeable, provided the value of such remaining portion is, in the opinion of the commissioners, equal to at least three times the certified capital value of the rent-charge. In every case of exoneration the land remaining chargeable, whether a portion of the land originally chargeable or land substituted for it, or both, must be equal, in the opinion of the commissioners, to at least three times the capital value of the rentcharge.

3. Redemption is provided for by sect. 5 of 49 & 50 Vict. c. 54.

Though by sub-sect. (1) the provisions of the section are said to apply in the case either of an extraordinary charge or of a rent-charge under that Act, yet in working it will be found that they can only be applied to the former by first ascertaining and certifying the capital value of it, when it in fact becomes a rent-charge under the Act.

The process of redemption varies in different cases:—

(1) Where the person entitled to the charge is the incumbent of a benefice. In this case the owner of, or any person interested in, the land may pay the amount of the certified capital value to the Governors of Queen Anne's Bounty, to be held or applied by them for the benefit of the incumbent for the time being, as in the case of redemption of ordinary tithe rent-charge.[1] The

[1] See sect. 8 of 9 & 10 Vict. c. 73.

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receipt of their treasurer is a sufficient discharge to the person paying.

(2) Where the person entitled to the charge is absolutely entitled to it in fee simple in possession, or can dispose of it absolutely, or give an absolute discharge for its capital value. In this case the owner of, or any person interested in, the land may give one month's notice to the person entitled to the charge, and may at the expiration of that time pay or tender to him the amount of the certified capital value of the charge, or any less sum they may agree upon.

(3) In any other case the owner of, or any person interested in, the land, may pay the amount of the capital value of the charge into the Bank of England to the account of the Paymaster General in the matter of the landowner and titheowner (giving their names), and in the matter of the Act 49 & 50 Vict. c. 54. The money when so paid in is to be dealt with in the same way and to be applicable to the same purposes as money paid in under the Tithe Commutation Acts.[1]

In all three cases the commissioners, upon proof that payment or tender has been duly made, are to certify that the charge is redeemed. This certificate is final and conclusive, and absolutely frees the land from the charge from the date of the next half-yearly payment.

The following provisions in the Act of 1886 apply to redemption in the case of settled land:—

(1) Money applicable in the purchase of land to be

[1] See pp. 91, 92.

settled to or on any uses or trusts is applicable in or towards the redemption of a charge under the Act on land settled to or on the same uses or trusts (sect. 6, sub-sect. 1).

(2) Where a person is the tenant for life of land, subject to any charge under the Act, he may either—

(i) Borrow any money required for its redemption, charging the inheritance with repayment of the money with interest; the charge so created has the same priority as a rent-charge under the Act (sub-sect. 2 of sect. 6); or

(ii) Sell the land, or any part of it, or any other land settled to or on the like uses or trusts, and apply the proceeds in or towards the redemption of the charge.

APPENDIX.

(*See pp.* 82—84.)

23 & 24 VICT. c. 93, s. 32.—*Where land divided, commissioners may order rent-charge to be redeemed after apportionment.*] Whenever lands charged with rent-charge under any instrument of apportionment or altered apportionment shall be divided for building or other purposes into numerous plots, and it shall appear to the commissioners that no further apportionment of the said rent-charge can conveniently be made, the commissioners may, if they shall see fit, upon the application of any one owner of the said lands, and without the consent of any other owner, or of the person for the time being entitled to the receipt of the said rent-charge, and without limitation as to the amount thereof, by an order under their hands and seal direct that such rent-charge shall be redeemed by the payment by the owners of the lands chargeable therewith, within such time as the commissioners shall by such order direct and appoint, of a sum equal to twenty-five times the amount of such rent-charge.

41 & 42 VICT. c. 42, s. 5.—*Redemption of tithe on divided lands.*] Whenever lands charged with rent-charge under any instrument of apportionment or altered apportionment shall be divided for building or other purposes into numerous plots, and it shall appear to the commissioners that no further apportionment of the said rent-charge can conveniently be made, the commissioners may, if they shall see fit, upon the application of the owner or of the person for the time being entitled to the receipt of the said rent-charge, and without limitation as to the amount thereof, by an order under their hands and seal, direct that such rent-charge shall be redeemed by the payment by the owners of the lands chargeable therewith, within such time as the commissioners shall by such order direct and appoint, of a sum of money not less than twenty-five times the amount of such rent-charge.

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